Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE SHERWIN-WILLIAMS COMPANY,

Petitioner,

vs.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RON M. TAMBURRINO
THE SHERWIN-WILLIAMS COMPANY
101 Prospect Avenue
Cleveland, OH 44115
(216) 566-2360

RONALD LEO KAHN
Counsel of Record
HAROLD H. READER III
GREGORY A. GORDILLO
ULMER & BERNE LLP
1300 E. 9th Street, #900
Cleveland, Ohio 44114
(216) 621-8400

Attorneys for Petitioner

150690

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Although under ERISA Section 4212(c), Sherwin-Williams would not incur withdrawal liability in connection with its sale of the stock of Lyons Transportation Lines unless it had as a principal purpose by such sale the evasion or avoidance of such liability, the Sixth Circuit looked only to objective evidence to conclude that Lyons was fiscally moribund and its purchaser was a shell corporation and then held that evidence of Sherwin-Williams's contrary belief was irrelevant. But can intent be properly determined without considering the subjective evidence of that intent?

II. Due process requires a neutral and detached arbitrator at every MPPAA arbitration. MPPAA presents high bars that require employers to leap over factual presumptions by proving the negative that evasion or avoidance of withdrawal liability was not a principal purpose of a transaction. When the Sixth Circuit endorsed an analytical approach which adds an express and fatal presumption that a Fortune 200 company *always* considers withdrawal liability, did the court endorse preconceptions that raise the bars higher than due process allows?

III. Striking a fine balance between promoting commerce and protecting pension plans, Congress enacted one MPPAA statute to permit employers to sell the stock of a subsidiary without triggering withdrawal liability and another to prevent intentional evasion or avoidance of withdrawal liability. Although the latter statute can be invoked to deny application of the former, the Sixth Circuit held that when a stock sale is the only means to avoid withdrawal liability, it indicates an intent to evade or avoid that liability. Can a decision that so shakes the foundation of MPPAA's statutory scheme be correct?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner, The Sherwin-Williams Company, states that it has no parent company and its subsidiaries (other than wholly-owned subsidiaries) are:

Beijing Pratt & Lambert Paints Joint Venture Limited Liability Company (China)

Ellis/United Coatings Associates L.P.

FSW Coatings Limited (Ireland)

FSW Paints Limited (Ireland)

Hidrax S.A. (Brazil)

John's Color Wheel and Decorating, Inc.

Kayney Paints, Inc.

Duracoat Powder Manufacturing Inc. (Canada)

Sherwin-Williams Saudi Arabia Limited (Saudi Arabia)

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The decision of the United States Court of Appeals for the Sixth Circuit is reported at 158 F.3d 387 and is reproduced in Appendix A at pp. 1a-20a. The decision of the district court is reported at 969 F. Supp. 465 and is reproduced in Appendix B at pp. 21a-44a. The Report and Recommended Decision of the magistrate judge for the district court is reproduced in Appendix C at pp. 45a-58a. The decision of the arbitrator in Case No. 53-621-0002-91 (American Arbitration Association, Cleveland Regional Office) (February 7, 1994) is reproduced in Appendix D at pp. 59a-119a.

STATEMENT OF JURISDICTION

The judgment of the court below was entered on October 15, 1998. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

This action arises under the Employee Retirement Income Security Act of 1974 as amended by the Multiemployer Pension Plan Amendments Act of 1980. The sections central to this petition are: 29 U.S.C. § 1369(b); 29 U.S.C. § 1384; 29 U.S.C. § 1392(c); 29 U.S.C. § 1398; 29 U.S.C. § 1401 and 29 U.S.C. § 1451. The texts of these sections are set forth in Appendix F. This action also involves the due process clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction.

In January 1987, The Sherwin-Williams Company ("Sherwin-Williams") acquired Lyons Transportation Lines, Inc. ("Lyons"), a less-than-truckload motor carrier, in order to increase its distribution efficiency by developing a "rolling warehouse" system and to decrease its distribution costs. Despite Sherwin-Williams's expectations and projections, Sherwin-Williams realized that its rolling warehouse strategy was unsuccessful and Lyons lost money nearly every month after the acquisition, and for those reasons alone, on October 20, 1989, the Sherwin-Williams Board of Directors authorized the sale of Lyons.

Unfortunately, after the sale of Lyons, the new purchaser fared no better, having encountered a myriad of unexpected problems, and Lyons went bankrupt. As a result, Lyons withdrew from the multiemployer pension plans to which Lyons had been contributing. The plans, the New York State Teamsters Conference Pension and Retirement Fund (the "New York Fund"), the Central States, Southeast and Southwest Areas Pension Fund, and the Western Pennsylvania Teamsters and Employers Pension Fund, subsequently each demanded withdrawal liability payments from Sherwin-Williams. Thus, this action is but one of many arising from the demise of Lyons.

Indeed, the funds are not the only litigants with claims arising from Lyons's withdrawal from the funds. Sherwin-Williams too has claims. Sherwin-Williams sold Lyons to a purchasing group that held themselves out as part of — or at least affiliated with — Commons Bros., Inc. ("Common Bros."), a pharmaceutical distributor with annual sales of more than $200 million. The group represented that they would pay approximately $1.6 million in a cash down payment for Lyons. But without Sherwin-Williams's knowledge, and in direct breach of the purchase agreement, the purchasers obtained the down payment by borrowing against Lyons's accounts receivables. They also got substantially less assistance from Commons Bros. than they led Sherwin-Williams to believe. These factors, among others, contributed mightily to the failure of Lyons, and as a result, Sherwin-Williams filed an action against the principal investors associated with the Lyons sale.[1] In that action, Sherwin-Williams has asserted claims of fraud, civil conspiracy, and tortious interference with contract against the J.R.C. investors and other involved parties.

B. After Lyons Is Sold, It Unexpectedly Folds.

Three months after the Sherwin-Williams Board of Directors authorized the Lyons sale, Sherwin-Williams received, among other offers, an offer from J.R.C. Acquisition Corp. ("J.R.C."), a purported affiliate of Commons Bros. J.R.C. and Commons Bros. shared principals, and Sherwin-Williams was led to believe that Lyons would benefit from cash infusions by Commons Bros. and from obtaining Commons Bros.'s significant transportation business and know-how. With Commons Bros.'s business and cash, with the leadership from Commons Bros.'s executives

1. *The Sherwin-Williams Company v. Robert Castello, et al.*, No. 1:94 CV 0112, United States District Court, Northern District, Eastern Division.

and others knowledgeable about the trucking industry assuming the helm of J.R.C. and Lyons, and with a business plan developed by the J.R.C. principals designed to turn Lyons around, both Sherwin-Williams and J.R.C. expected that Lyons would once again become profitable. Thus, Sherwin-Williams agreed to sell the stock of Lyons to J.R.C. for a purchase price of $7,850,000, of which $1,600,000 was to be paid as a cash down payment with the balance payable over six years in accordance with a promissory note secured by certain of Lyons's real estate. Flush with high hopes, the parties closed the sale on June 1, 1990.

The understandings of Sherwin-Williams regarding the supportive role Commons Bros. was to play with respect to J.R.C. and Lyons were reflected in financial records of Commons Bros. indicating its payment of certain bills and expenses related to the acquisition of Lyons.

Thus, despite Lyons's history of financial losses, Sherwin-Williams had numerous reasons to believe that J.R.C. could succeed where Sherwin-Williams had failed. At the request of Sherwin-Williams, the President of Lyons had conducted a study and determined that Lyons could be returned to profitability in three years. According to a Sherwin-Williams executive who was intimately involved in the Lyons transaction, Lyons could succeed without Sherwin-Williams, and other means were available to continue operating Lyons and generating cash flow without subsidization. Indeed, Sherwin-Williams had not pursued numerous options and endeavors available to make Lyons profitable. This was so since, for Sherwin-Williams, its motivating reason for acquiring Lyons to develop a "rolling warehouse" to speed delivery of paint had proven unsound and the time and effort required to make Lyons profitable did not seem commensurate with the reward in light of Sherwin-Williams's levels of profitability from its primary business as a manufacturer of paint.

J.R.C. likewise believed Lyons could become profitable. The J.R.C. business plan projected a return to profitability for Lyons in one year. The Controller of Lyons, who was the New York Fund's key witness at the arbitration proceedings, was equally optimistic, also expecting that Lyons would increase sales, decrease losses, and become profitable within one year.

The Lyons deal even attracted a multi-millionaire investor knowledgeable in financial and trucking industry matters. Frederick

Kirschner had reviewed at least one hundred business plans or prospectuses over a dozen years, and after reviewing the J.R.C. business plan, Mr. Kirschner invested all the cash he had available at the time because he: 1) was confident in the personal and professional backgrounds of the J.R.C. principals; 2) believed that the J.R.C. business plan could easily succeed; and 3) believed he would receive a profitable return on his investment of $600,000. Unfortunately for Mr. Kirschner he never got a return on his $600,000. Instead, unbeknownst to Sherwin-Williams, the other investors diverted his investment funds away from J.R.C., thus further depleting Lyons of the working capital that would have been available if the J.R.C. principals had not applied the proceeds from factoring Lyons's receivables to make the down payment for Lyons's stock.[2]

Despite the optimistic predictions and expectations, after the sale Lyons encountered numerous problems which were never expected by Sherwin-Williams. Many of these problems could be attributed to the wrongful depletion of Lyons's working capital by the shared principals of J.R.C. and Commons Bros. In addition, shortly after the sale, Sherwin-Williams unexpectedly was sued by Lyons and subsequently stopped giving its substantial business to Lyons.[3] Four months after being purchased by J.R.C., Lyons filed Chapter 11 bankruptcy proceedings.

C. The New York Fund Not Surprisingly Collects.

Initially, the New York Fund demanded a withdrawal liability payment of $1,606,605. After conferring with Sherwin-Williams's

2. These acts led to yet another lawsuit; *Frederick Kirschner v. Robert Castello, et al.*, No. 91 CV 5895, United States District Court, Eastern District, Pennsylvania.

3. Three weeks after Sherwin-Williams sold Lyons to J.R.C., this Court issued *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), reversing the precedent established by six circuit courts, and denouncing a long-observed Interstate Commerce Commission policy. Relying upon *Maislin* and within two months of the sale, Lyons, now under J.R.C.'s management, sued Sherwin-Williams, claiming that Sherwin-Williams owed more than $15,000,000 in undercharges in connection with transportation services provided by Lyons. As the acrimony between Sherwin-Williams and Lyons increased for this and other reasons, the business between the two companies decreased. Eventually, Sherwin-Williams discontinued all of its business with Lyons, and that business had accounted for approximately seven percent of Lyons's total shipping revenues.

counsel, however, the Fund recalculated and determined that the appropriate liability was $477,270 plus interest. As required by ERISA, Sherwin-Williams paid the $477,270 plus interest; then it challenged the liability and the gap year interest assessment in an arbitration proceeding, as required by ERISA.

D. Sherwin-Williams And The New York Fund Litigate.

The arbitration took place during the week of October 25, 1993, and on February 7, 1994, the arbitrator rendered his decision. Although the arbitrator correctly concluded that Sherwin-Williams did not have to pay gap year interest,[4] he nevertheless found that Sherwin-Williams was subject to withdrawal liability on the grounds that a principal purpose of the sale of Lyons's stock to J.R.C. was to evade or avoid withdrawal liability.

Sherwin-Williams next challenged the arbitrator's decision by filing a complaint to vacate the award. The New York Fund and Sherwin-Williams each filed a dispositive motion, and the motions were referred to a magistrate. He recommended enforcing the arbitrator's award. On April 1, 1997, the district court adopted the magistrate judge's report and recommended decision and affirmed the arbitrator's opinion.

The decisions were next reviewed by the Sixth Circuit. The court of appeals was without a firm conviction that the arbitrator made a mistake regarding his findings of fact. The court also found no constitutional infirmities in the arbitration process. Finally, the court recognized that the arbitrator failed to follow the requisite statutory framework for analyzing the facts. But the court held that the error was not prejudicial. Thus, the court affirmed the district court's opinion.

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4. The New York Fund subsequently appealed the gap year interest decision to the district court. But in the meantime, this Court made clear that gap-year interest is inapplicable. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995). With the benefit of that decision, the district court found in favor of Sherwin-Williams, and the New York Fund abandoned its appeal.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below is not only erroneous but also extraordinary by its impact. Without this Court's intervention, essential provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) will be eviscerated.[5] Withdrawal liability will become an absolute liability, and statutory safe harbors will offer no shelter. Moreover, the balance between protecting commerce and promoting multiemployer plans will be destroyed. Finally, every MPPAA arbitration proceeding will become the lair for due process violations. This Court should grant this Petition.

The fact pattern before this Court is common in the United States. A parent company purchases or creates a subsidiary. Despite the hopes and plans of the parent, the subsidiary becomes unprofitable and a drain on the parent. The parent then wants to get rid of the subsidiary. New business minds step forward with new ideas and hopes about the subsidiary; so the parent sells the stock of the subsidiary to the new minds. The cycle, however, continues, and the new minds are unable to save the subsidiary which fails. The failure, of course, means that the subsidiary can no longer make contributions to the pension plans of its

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5. MPPAA was added to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301-1461 after Congress determined that the pension plan termination insurance program created by ERISA's Title IV was ineffective because employers contributing to multiemployer pension plans too often withdrew from the plan leaving the remaining contributors and the plan to shoulder the burdens of unfunded vested liabilities attributable to the discontinuance of the withdrawing employer's participation. Thus, the Act required that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391. *See generally Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The MPPAA also included intricate — and in some cases "incoherent" — provisions designed to permit employers to cease contributions without incurring withdrawal liability and to allow employers to challenge withdrawal liability determinations. *E.g.*, 29 U.S.C. §§ 1384, 1398, and 1401. The Act also sought to protect against sham transactions designed to evade or avoid withdrawal liability. 29 U.S.C. § 1392(c). Collectively, these provisions have been at issue in this action.

former employees, and — in the case of multiemployer plans — the funds impose withdrawal liability. The basis for the claim will always be that the parent knew its subsidiary was failing and did not want to be strapped with the withdrawal liability. Therefore, the funds will claim that contrary to 29 U.S.C. § 1392(c), ERISA section 4212(c)[6], the parent sold the subsidiary to evade or avoid that liability, and that the sale transaction should be disregarded in ascribing withdrawal liability to the parent as part of the subsidiary's original controlled group.

If the law is permitted to remain as announced by the Sixth Circuit, the parent company will be liable regardless of whether it actually intended to evade or avoid withdrawal liability. If that parent has substantial resources that suggest the parent has competent counsel and business acumen, the parent will be presumed to know about withdrawal liability. If a sale of stock is the only apparent way to avoid withdrawal liability because the transaction falls within the purview of § 1398, the parent will be presumed to have considered and intended to evade or avoid withdrawal liability. In short, the fact pattern presented now and repeated regularly will inevitably lead to withdrawal liability. While Congress intended to protect pension plans, it certainly did not intend to prevent — or even chill — all sales of subsidiaries that contribute to pension plans. Yet that is precisely the result of the opinion below.

REASONS FOR GRANTING THE PETITION

I. A CONFLICT AMONG THE CIRCUITS EXISTS REGARDING HOW TO DETERMINE WHETHER A PRINCIPAL PURPOSE OF A TRANSACTION WAS TO EVADE OR AVOID MPPAA WITHDRAWAL LIABILITY.

The Sixth Circuit decision conflicts with other circuits. Given the fact pattern above, the Third, Sixth, and Seventh Circuits differ when analyzing whether a parent company sold its subsidiary with a principal purpose of evading or avoiding withdrawal liability. In the Sixth Circuit, regardless of what the parent company thought, believed, or intended, it will be liable if the court believes that objective evidence suggests an impermissible intent. In the Third Circuit, even if the parent did think,

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6. From this point forward, references will be made only to the ERISA or MPPAA section as it appears in United States Code Title 29.

believe, or intend to evade or avoid withdrawal liability, no liability exists unless the purchaser shared the same thought, belief or intent. Finally, in the Seventh Circuit, what the purchaser thought, believed or intended is irrelevant, and subjective evidence of the seller's intent may be sufficient to prove liability without regard to the objective evidence.

To prevent the possibility of inconsistent decisions arising from the instant facts, or future disputes throughout the country, this Court should resolve the conflict.[7] This is no mere academic conflict. Indeed, the need for resolution is urgent in light of the fact that three funds are litigating the 'evade or avoid' issue against Sherwin-Williams right now, and the funds not a party here are proceeding in the Seventh and Third Circuits — the Circuits that have standards different from that announced by the court below. Thus, the action presents facts and law ripe for this Court's review.

Under MPPAA, which amended the Employee Retirement Income Security Act of 1974 ("ERISA"), "[i]f a principal purpose of any transaction is to evade or avoid [withdrawal] liability[,]" the liability will be "determined and collected without regard to such transaction."[8] Thus, this issue always concerns the same dispositive fact: the employer's intent. As the Seventh Circuit explained: "The issue is purpose, a state of mind inferred from testimony and other evidence."[9] Despite this central, subjective element to the claim, the Sixth Circuit has held that the employer's subjective intent is not relevant to these § 1392(c) disputes. As a result, the opinion below contradicts the core of the statute and the law in the Third and Seventh Circuits.

The Third Circuit uses a standard plainly different from both the Seventh and Sixth Circuits. In *Dorn's Transportation, Inc. v. Teamsters*

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7. The Ninth Circuit also appears to have a conflict with the Sixth Circuit. As described in a footnote to *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 631, n.18 (1993), the Ninth Circuit in that case relied on the district court's reasoning which "did not go so far" as to treat subjective intent as irrelevant. Although this Court offered no more illumination on the issue, it affirmed the Ninth Circuit. Thus, a conflict between the Sixth and Ninth Circuits can be easily anticipated.

8. 29 U.S.C. § 1392(c).

9. *Santa Fe Pacific v. Central States, Southeast and Southwest Areas Pension Fund*, 22 F.3d 725, 727 (7th Cir. 1994).

Pension Trust Fund of Philadelphia and Vicinity,[10] the court held that the intent of *both* the parent company *and* the purchaser had to be evasion or avoidance:

> Surely, § 1392 was designed to guard against the intentional evasion of liability. It may be that Walter Dorn entered into the transaction with Oneida in order to escape withdrawal liability (There is no evidence to this effect on the record but we will assume it to be so *arguendo).* However, when the seller enters a transaction to escape liability, *but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the Plan, it does not appear that a "principal purpose of the transaction" as a whole is to escape liability.* Here, given Oneida's lack of awareness of Dorn's potential liability and Oneida's long period of continued payments, Oneida cannot be said to have entered the transaction in order to evade liability.
>
> In short, the kind of bad faith that § 1392 guards against is not at issue in this case.[11]

Neither the Sixth Circuit nor the Seventh Circuit has gone this far.

The conflict between the Third and Sixth Circuits is further evidenced by the similarity between the facts in *Dorn's Transportation* and this case. In *Dorn's*, the stock of a trucking business was sold to a buyer company that went bankrupt. When the buyer went bankrupt, pension plan contributions stopped, and the fund attempted to assess withdrawal liability against the seller. In contrast to the Sixth Circuit, however, the Third Circuit held in favor of the seller. When the facts of two cases are closely analogous and the articulated legal standards distinct, contrary results in the two cases at least suggest a conflict.

But the conflict is inescapable when comparing another, more recent decision from the Third Circuit. Faced with facts nearly identical to those at issue now, the Third Circuit affirmed a decision in favor of the seller in *Teamsters Pension Trust Fund of Philadelphia and Vicinity v.*

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10. 787 F.2d 897 (3rd Cir. 1986).

11. *Id.* at 902 (emphasis added).

Federal Express Corp.[12] In that case, a parent company owned a subsidiary trucking company that clearly needed a cash infusion to survive. The parent company did not believe it had the resources to turn the subsidiary around and decided to sell the subsidiary. The subsidiary's CFO formed a company to purchase the subsidiary. The terms of the deal required the purchaser to pay $1,000 in cash and give the parent company a note for $10.5 million secured by the subsidiary's real estate. The sale closed in January 1985, after which the subsidiary experienced ongoing, unexpected problems, including the departure of a substantial part of the management team. Fourteen months later, the subsidiary filed Chapter 11 bankruptcy proceedings, and shortly thereafter, the pension funds sought withdrawal liability from the parent company. The district court relied upon *Dorn's* two party analysis[13] and affirmed the arbitrator's finding that the transaction was not made with a principal purpose of evading or avoiding withdrawal liability. The Third Circuit affirmed without an opinion. Given the identical fact patterns represented in this case and in the *Philadelphia Fund* case, only one conclusion is possible. The Sixth and Third Circuits applied different, conflicting standards.

The conflict between the Third and Seventh Circuits is even more clear. In *Santa Fe Pacific*, the Seventh Circuit expressly rejected the Third Circuit's analysis:

> The statutory criterion is not whether the transaction is a sham, having no purpose other than to defeat the goals of the Multi-employer Pension Plan Amendments Act by leaving the other employers in the multiemployer pension plan holding the bag. It is whether the avoidance of withdrawal liability by the seller (*not necessarily by the purchaser as well*) is one of the principal purposes of the transaction.[14]

Although implicit rather than explicit, the difference between the Sixth Circuit and Seventh Circuit approach, is equally clear. Sherwin-

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12. 1995 WL 791371 (D. Del.) (attached as Appendix E), *affirmed*, 96 F.3d 1432 (3rd Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997).

13. *Id.* at *5.

14. 22 F.3d at 729-30 (emphasis added).

Williams consistently argued that the subjective evidence of its beliefs is relevant to determining the existence of withdrawal liability. The Sixth Circuit squarely rejected the argument and declared:

> According to Sherwin-Williams, the crucial issue, not addressed by the arbitrator or the district court, is not whether or not Lyons was economically viable, but whether Sherwin-Williams believed that Lyons was economically viable. Sherwin-Williams is mistaken.[15]

Then the court added a footnote and amplified its rejection of a subjective element to the evade or avoid analysis:

> Sherwin-Williams makes a similar argument with regard to the economic viability of J.R.C. This argument is similarly without merit. *No matter what Sherwin-Williams claims to have subjectively believed* about the financial condition of J.R.C., the objective evidence, of which the record shows Sherwin-Williams was aware, clearly demonstrated that J.R.C. had neither capital, assets nor financial backing.[16]

But in stark contrast, the Seventh Circuit went to great lengths in examining direct evidence of what Santa Fe Pacific actually thought.

Indeed, the *Santa Fe* court found in favor of the pension fund based on overwhelming direct evidence of the employer's *subjective* view of withdrawal liability potential. For example, one consultant advised the employer that pension fund liability was "a major stumbling block in implementing the liquidation of" the subsidiary.[17] The company president then acknowledged that this report was his "first sort of hit with a 2 by 4 about MPPAA."[18] There was also evidence of discussions within the company concerning the amount of potential withdrawal liability and

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15. Appendix A at pp. 11a-12a.

16. *Id.* at 12a, n.3 (emphasis added).

17. 22 F.3d at 728.

18. *Id.*

how to avoid it.[19] Company documents included language such as the "specter of Multiemployer Pension Plan Act, which imposes liability for withdrawal from the teamster retirement plan," and "if a purchaser [for the subsidiary] can be located, there is a good possibility of transferring part or all of a rather substantial liability which the company is incurring under the Multiemployer Pension Plan Amendments Act."[20] Thus, the direct evidence of the employer's subjective intent was essential to the court's finding in favor of the fund.

Without any similar evidence of Sherwin-Williams actually intending to evade or avoid withdrawal liability, the Sixth Circuit necessarily created a standard different from the Seventh Circuit to support the same conclusion. And the Sixth Circuit certainly never considered — as the Third Circuit requires — whether the purchaser, J.R.C., intended to evade or avoid withdrawal liability. This is precisely the type of conflict that cries out for resolution by this Court.

The conflict is particularly harmful because of the unique role arbitration plays in MPPAA disputes. As more than one court has noted, "arbitration reigns supreme."[21] Moreover, the congressional intent expressed through MPPAA to rely upon arbitration as a means to promote judicial restraint and economy cannot be understated.[22] Indeed, by statutory design, any review of an arbitrator's withdrawal liability decision is greatly limited. As provided in § 1401(c): "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttal only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." Given this extraordinary presumption of correctness to the highly factual conclusions of the arbitrator in an evade or avoid dispute, the need for this Court to establish a uniform standard is particularly important and urgent.

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19. *Id.*

20. *Id.* at 729.

21. *E.g., I.A.M. Nat'l Pension Fund v. Clinton Engines*, 825 F.2d 415, 422 (D.C. Cir.1987); *Teamster Pension Trust Fund v. Central Mich. Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988).

22. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1248-49 (3rd Cir. 1987) (and cases cited therein).

Arbitrators now face the difficult task of applying the many facts that must be evaluated in an "evade or avoid" case to a legal standard that is in a state of conflict. At the same time, neither MPPAA nor the regulations promulgated thereunder by the Pension Benefit Guaranty Corporation provide any basis for an arbitrator to identify the circuit whose law should control the decision in a particular case. Thus, a uniform standard for interpreting § 1392(c) to assist the arbitrator in evaluating the evidence presented by the plan and the employer is urgently needed to avoid the disarray that presently exists, and to prevent the extraordinary statutory presumption favoring arbitrators' decisions from insuring different outcomes based upon forum selection.

Indeed, while arbitration decisions are reviewable in "an appropriate United States district court,"[23] nothing requires either party to proceed in the same jurisdiction in which the arbitration took place. MPPAA's venue provision[24] states only that an action may be brought where the plan is administered or where a defendant resides or does business. Employers and plans can therefore be expected — to the extent possible — to race to a court in the jurisdiction having the most favorable precedent after an unfavorable award. Only a uniform standard will prevent such forum shopping.

A uniform standard of liability under § 1392(c) will serve numerous salutary purposes. It will aid arbitrators and the courts in the disposition of cases. As important, it will both provide plans and their contributing employers with necessary guidance for planning and structuring business transactions with pension implications and reduce or limit litigation in this area. Given the conflict among the circuits, a uniform standard for interpreting this provision can only come from this Court. Thus, the Petition should be granted.

II. A DECISION THAT RENDERS ALL MPPAA WITHDRAWAL LIABILITY ARBITRATION PROCEEDINGS UNCONSTITUTIONAL SHOULD BE REVIEWED AND REVERSED BY THIS COURT.

Contrary to this Court's ruling in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern*

23. 29 U.S.C. § 1401(b)(2).

24. 29 U.S.C. § 1451(d).

California,[25] the Sixth Circuit foreclosed facts from independent consideration, and as a result Sherwin-Williams has been, and other Fortune 200 companies will be, deprived of their rights under the Due Process Clause to an impartial adjudication in withdrawal liability arbitration proceedings.

In furtherance of its objective to protect multiemployer plans, Congress, in enacting MPPAA, included § 1401(a)(3)(A) to direct arbitrators to accord a plan sponsor's determinations relating to withdrawal liability matters a presumption of correctness when weighing evidence in proceedings relating to a challenge lodged by an employer with respect to such determinations as follows:

> [A]ny determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.[26]

In *Concrete Pipe*, this Court parsed the language of the statute and determined that it could only be saved from constitutional infirmity by this Court's holding that the statute meant that employers challenging a fund's determination had to disprove the determination by a preponderance of the evidence.[27] This preponderance standard requires the arbitrator to believe that the existence of a fact is more probable than its nonexistence before he may find in favor of the employer.[28] Thus, at the core of the opinion, *Concrete Pipe* saved § 1401(a)(3)(A) by construing it in a manner that would "not foreclose any factual issue from independent consideration by the arbitrator. . . ."[29] At the same time, this Court cautioned that "if the employer were required to show the trustees' findings to be either

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25. 508 U.S. 602, 625, 629 (1993).

26. 29 U.S.C. § 1401(a)(3)(A).

27. 508 U.S. at 629.

28. *Id.* at 622.

29. *Id.* at 630.

'unreasonable or clearly erroneous,' there would be a substantial question of procedural fairness under the Due Process Clause."[30]

But here the Sixth Circuit applied § 1401(a)(3)(A) in a manner contrary to *Concrete Pipe's* guidance, and endorsed an arbitrator's express preconceptions based on Sherwin-Williams's status as a Fortune 200 company, thus creating a law that violates the very precept that *Concrete Pipe* used to save the same statute. The standard endorsed by the Sixth Circuit and faced by Sherwin-Williams (and now every Fortune 200 company in the Sixth Circuit) bars even the appearance of a neutral and detached adjudicator. That was precisely the concern *Concrete Pipe* addressed when it noted:

> "[J]ustice", indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.[31]

One of Sherwin-Williams's important arguments at the hearing was that (although permissible) it never gave more than passing consideration to withdrawal liability in connection with the sale of Lyons. This argument, however, never had a chance because the arbitrator had already decided that the issue is always considered by a Fortune 200 company, and the Sixth Circuit found this conclusion well-reasoned. Although the arbitrator said he gave no weight to the presumption accorded the Fund under MPPAA (and the courts below believed this declaration), the contrary is in fact the case since the arbitrator's expressed bias foreclosed the possibility that Sherwin-Williams's arguments and proffered evidence regarding nonconsideration of MPPAA issues would be given independent consideration by the arbitrator.

Repeatedly, the arbitrator in this case wrote that his decision was predicated on Sherwin-Williams's corporate status. This bias sealed Sherwin-Williams's fate before the process even began. The arbitrator opined:

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30. *Id.* at 626.

31. *Id.* at 618 (alterations in original).

> [Withdrawal liability] may be considered — and *if the truth be known, is always known and considered* (or, at least, should always be known and considered) — by competent corporate executives and benefits counsel.[32]

Three pages later, he added:

> [O]nce you realize that Sherwin-Williams is a Fortune 200 company, with knowledgeable experts and personnel and a $7 million issue, *you know it was a factor* and, in the overall context, "a principal purpose" to be rid of the Title IV liability.[33]

Such outrageous statements by the arbitrator –based on his intuitive "you know it was" approach — clearly reveal his predisposition to rule against Sherwin-Williams. This is certainly not the independent review mandated by due process and *Concrete Pipe.*

That the Sixth Circuit endorsed the arbitrator's preconceptions is clear from its analysis of the objections raised by Sherwin-Williams. The Sixth Circuit restated such preconceptions in its own words:

> The arbitrator observed that it would be impossible *for a company such as Sherwin-Williams* not to take withdrawal liability into consideration.[34]

Thus, the Sixth Circuit clearly allowed the arbitrator to impute knowledge and thought processes to "a company such as Sherwin-Williams." It permitted the arbitrator to do so based upon his own "you know it was" approach, contrary to the direct evidence presented by Sherwin-Williams and without any evidence presented by the New York Fund as to what Fortune 200 companies know and think. The Sixth Circuit did not find fault with this because it observed that, after all, there was evidence which would be consistent with the arbitrator's determination and because the arbitrator was supposed

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32. Appendix D at p. 116a (emphasis added).

33. *Id.* at 118a-119a (emphasis added).

34. Appendix A at p. 18a (emphasis added).

to make determinations with respect to such matters. However, these reasons offered by the Sixth Circuit belie the seriousness of the problem created and reveal that, although the Sixth Circuit referred to this Court's holding in *Concrete Pipe* for guidance as to how the § 1401(a)(3)(A) presumption should be applied, and although the Sixth Circuit articulated the preponderance standard explained by this Court, it did not grasp the significance of its decision.

The problem with the Sixth Circuit allowing the arbitrator to apply his preconceptions as to the knowledge and thought processes of a Fortune 200 company in place of evidence is further demonstrated by the arbitrator tossing aside evidence presented by Sherwin-Williams of a viable business plan developed by the J.R.C. principals and designed to return Lyons to profitability within one year — a time frame consistent with the testimony of the New York Fund's key witness — whereby the arbitrator remarked:

> [i]f JRC had a business plan (a panacea for financial success for an LTL in upstate New York in 1990), could not the talent at Sherwin-Williams and/or available to it have arrived at the same or a similar business plan, a similar panacea?[35]

Perhaps the mere bias of a single arbitrator would not be a sufficient basis to invoke this Court's intervention, but Sherwin-Williams submits that the bias here is beyond a single arbitrator. It is systemic, as evidenced by the standards employed. To couch this analysis in terms of *Concrete Pipe*, the arbitrator's preconceived bias with respect to those facts which he imputed to a Fortune 200 company deprived Sherwin-Williams of an initial, impartial adjudication. By his "you know it was" approach, the arbitrator by-passed the fact finding stage that he was appointed to conduct and already reached a conclusion. Thus, the degree of certainty with which Sherwin-Williams was required to rebut the presumption as to the correctness of such facts was raised dramatically from the appropriate preponderance standard to the much higher appellate levels of "unreasonable" or "clearly erroneous" required to convince the arbitrator that he was mistaken in having already determined the existence of such facts.

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35. Appendix D at pp. 106a-107a.

If the Sixth Circuit's opinion is permitted to stand, every Fortune 200 company in that Circuit will be deemed to have considered the withdrawal liability issue before any transaction even occurs, and if the context of that transaction suggests that withdrawal liability exists which is significant in relation to the sale price of the subsidiary, then — in this "overall context" — a finding that the transaction occurred with a principal purpose to evade or avoid liability may be required as a matter of law. On this basis, however, an arbitrator following the Sixth Circuit's law cannot be considered independent from the start, and no large employer will ever be sure if it is getting the fair treatment required by due process. This is so because based on the Sixth Circuit's law, one will never know if the other evidence presented by the plan sponsor would be sufficient, in and of itself, to defeat a challenge by a Fortune 200 company which proffers evidence to rebut the plan sponsor's determination. The incorporation of the arbitrator's preconceived bias into the deliberative process taints the outcome. As this Court admonished in *Concrete Pipe*, it forecloses the factual issue with respect to which the arbitrator applies the "you know it was" approach from independent consideration. The Sixth Circuit's acceptance of this approach violates due process and this Court should correct the injustice done to Sherwin-Williams.

This case needs the attention of this Court not merely to correct the singular wrong done to Sherwin-Williams. This case presents a fact pattern distinct from that which was before *Concrete Pipe*, and as a result presents an important opportunity for this Court to provide much needed MPPAA guidance. Unlike *Concrete Pipe*, Sherwin-Williams had to prove an exceedingly difficult negative — namely, a lack of intent. In contrast, *Concrete Pipe* involved issues regarding the date of withdrawal and the actuarial methods of calculating the liability. Neither involved substantial discretion. Thus, as Justice Thomas explained in his concurrence:

> I am inclined to believe that the arbitration proceeding — presumption and all — provides adequate process for the employer. This conclusion rests principally on the nature of the particular statutory determinations to which the presumption applies (those described in §§ 1381-1399 and 1405). Many of these determinations, such as the mathematical determinations the trustees must perform under §§ 1386, 1388, and 1391, involve little or no discretion. As a result the employer will have

> correspondingly little difficulty proving the existence of any significant error made by the trustees (either inadvertently or because of bias). The same can be said for withdrawal date determinations under §§ 1381 and 1383. . . .[36]

Justice Thomas was correct regarding the facts before the Court then, but issues regarding the intent to evade or avoid withdrawal liability are quite different. The issue raised now involves a highly discretionary matter. As a result, the Court may correct the wrongs in this case and fill in the gap left by *Concrete Pipe*.

III. TO PRESERVE THE CONGRESSIONAL BALANCE GIVEN TO PROMOTING COMMERCE AND PROTECTING PENSION PLANS, THIS COURT SHOULD REVIEW AND REVERSE THE DECISION BELOW.

The impact of the decision below will reach far beyond merely the two litigants. Nearly 42 million people have pension benefits, and approximately 8.7 million of them have benefits from more than 2,000 multiemployer plans.[37] In addition to the New York Fund, two other funds are awaiting the outcome of this litigation which will directly impact their claims against Sherwin-Williams in amounts exceeding $2 million. Of course, the other contributors to these plans also have an interest in this litigation, and in the case of the Central States, Southeast and Southwest Areas Pension Fund, that means thousands of other companies will be directly impacted by this litigation. But perhaps the most significant impact of the decision below is its threat to every day merger and acquisition commerce. More specifically, the Sixth Circuit's sweeping construction of § 1392(c) will create serious practical problems for all businesses that attempt to sell subsidiaries subject to MPPAA, frustrating Congressional intent to "protect[ ] the solvency and viability of pension plans with the least practical intrusion into normal business transactions."[38]

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36. 508 U.S. at 654 -55.

37. PBGC Annual Report of 1995.

38. *Central States, Southeast and Southwest Areas Health & Welfare Fund v. Cullum Co.*, 973 F.2d 1333, 1340 (7th Cir. 1992); *see also* 29 U.S.C. § 1001(a).

Sherwin-Williams does not dispute the possibility that § 1392(c) can apply when an employer structures a transaction in compliance with § 1398 to prevent the assessment of withdrawal liability when from the surrounding facts it is shown that the employer was acting in bad faith and that the transaction was a sham.[39] This seems to be the clear intent of Congress in structuring § 1392(c) so that it can trump the special exceptions contained in §§ 1384 and 1398, which were created by Congress to allow employers to engage in legitimate dispositions of businesses without triggering withdrawal liability. The Circuit Courts that have addressed this issue and the Pension Benefit Guaranty Corporation seem to be in agreement on this point.[40] Thus, even though an employer invokes §§ 1384 or 1398 to claim an exception from the imposition of withdrawal liability, the employer is not out of the woods if an evil intent existed such that the transaction was a sham.

Further, Sherwin-Williams does not dispute the possibility that the very fact that an employer's divestiture of a business takes the structure

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39. *See Flying Tiger Line v. Teamsters Pension Trust*, 830 F.2d 1241, 1247, 1254 (3d Cir. 1987) (characterizing § 1392(c) as a "sham transaction" rule that is triggered by a showing of "bad faith") and *Teamster Pension Trust Fund v. Central Mich. Trucking, Inc.*, 698 F. Supp. 698, 703 (W.D. Mich. 1987), *affirmed*, 857 F.2d 1107 (6th Cir. 1988) (holding that the Fund must show a transaction to be a sham to come within § 1392(c)); *see also Cuyamaca Meats, Inc. v. Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987) (affirming the district court's view that "section 1392(c) was directed at essentially fraudulent maneuvers lacking in economic substance" (638 F. Supp. at 890)). *But see, Santa Fe Pacific*, 22 F.3d at 729-30 (quoted at p. 10, *supra*, and holding that § 1392(c) can be triggered without showing that the transaction reached the level of a "sham"). In this regard, the Court is now presented with another conflict among the Circuits. Although Sherwin-Williams does not claim that it previously raised any issue regarding whether §§ 1384 and 1398 could only be "trumped" by a "sham" transaction, this issue appears to be nearly indistinguishable from the question of what standard applies when determining whether a principal purpose of a transaction was to evade or avoid withdrawal liability, and that question has certainly been previously raised by Sherwin-Williams in Part I of this argument and each proceeding below.

40. *See Dorn's Transp., Inc. v. Teamster Pension Trust Fund*, 787 F.2d 897 (3d Cir. 1986); *Central States, Southeast and Southwest Areas Health & Welfare Fund v. Cullum Companies, Inc.*, 973 F.2d 1333, 1340 (7th Cir. 1992); PBGC Opn. Ltr. 84-7 (December 20, 1984); PBGC Opn. Ltr. 85-15 (May 31, 1985); PBGC Opn. Ltr. 92-1 (March 30, 1992).

of a stock sale could itself be evidence of the employer's intent to evade or avoid withdrawal liability if other valid evidence is produced which clearly reflects the fact that the employer deliberately selected that form of transaction with a principal objective of evading or avoiding such liability. This was the situation presented in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*,[41] with respect to which this Court denied *Santa Fe*'s petition for a writ of certiorari.[42]

Neither of the above-described situations are what is at issue in this case. Neither of the above-described situations does harm to the fine balance established by Congress between §§ 1384 or 1398, on the one hand, and § 1392(c), on the other hand. However, here, the Sixth Circuit has made an improper leap which, if allowed to stand, will not only create a great unfairness to all employers contributing to multiemployer plans, but undermine the very strength of multiemployer plans that Congress sought to achieve by its enactment of MPPAA.

What the Sixth Circuit did in this case, with which Sherwin-Williams finds grave fault, is to hold that when a stock sale appears to be the only means by which an employer can dispose of a subsidiary without incurring withdrawal liability, that form of transaction itself indicates an intent to evade or avoid withdrawal liability so as to justify application of § 1392(c). Here there was no direct evidence presented by the New York Fund that Sherwin-Williams made any conscious decision to utilize a stock sale specifically to avoid MPPAA liability. Instead, the New York Fund and the arbitrator merely postulated, based on circumstantial evidence, that Sherwin-Williams must have analyzed various alternatives relating to the disposition of Lyons and by "circumstantial logic" and inference concluded that Sherwin-Williams selected the sale of stock method as the only option that would stop the bleeding, get a fair price, get Sherwin-Williams out of the crumbling less-than-truckload transportation business, and "incidentally rid Sherwin-Williams of the withdrawal liability"[43] to the New York Fund and the other funds to which Lyons contributed. The Sixth Circuit embraced this circumstantial logic. It held that notwithstanding the fact that Sherwin-Williams's Board of Directors

41. 22 F.3d 725 (7th Cir. 1994).

42. 513 U.S. 987 (1994).

43. Appendix D at p. 106a.

authorized the sale of Lyons on October 20, 1989, before Sherwin-Williams was aware of withdrawal liability, and notwithstanding its finding that "[t]he arbitrator conceded as much when he stated that there was 'no evidence to support an affirmative intent to violate [29 U.S.C. § 1392(c),] ERISA § 4212(c) at this point in time' ", * * *

> This does not alter the fact, however, that Sherwin-Williams was presented with a number of options for disposing of Lyons, and that it chose the only one that would not subject it to withdrawal liability. . . .[44]

The Sixth Circuit also rejected Sherwin-Williams's argument that under MPPAA the transaction could have been structured as an asset transaction under § 1384 and avoided imposition of withdrawal liability and, although Sherwin-Williams had presented evidence as to why it would not have made any business sense to sell assets, the Sixth Circuit disregarded this argument as not presenting Sherwin-Williams with a viable alternative so as to overcome its burden of proof. Yet, in the *Santa Fe* case, this is precisely the kind of argument the Seventh Circuit found persuasive in holding that Santa Fe had selected a stock sale, even though an asset sale was economically better, to avoid withdrawal liability.

Thus, the Sixth Circuit held that even though there was no direct evidence that Sherwin-Williams used the stock sale form of transaction to dispose of Lyons with an intention to evade or avoid withdrawal liability, the very nature of the transaction as a stock sale indicated that intent. In reaching its holding, the court did not dwell on the interplay of §§ 1398 and 1392(c) or seem to take note of the thin ice on which it was placing employers.

Congress articulated its reasons for enacting MPPAA in Section 3(c) of the Act:

> (c) It is hereby declared to be the policy of this Act —
>
> (1) to foster and facilitate interstate commerce,
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

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44. Appendix A at pp. 15a-16a.

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.[45]

To achieve its objectives, Congress preserved the ability of employers to dispose of business operations without being considered to have withdrawn from a multiemployer plan if certain conditions were satisfied. These safe harbors for employers who sell businesses (or make other corporate changes) in ways that do not reduce the contribution base are found in §§ 1384 and 1398. Section 1384 provides that an employer that ceases to contribute to a multiemployer plan as a result of a sale of assets will not be subject to withdrawal liability if it takes specified steps to ensure that the asset purchaser will continue to contribute to the plan. Section 1398 provides that an employer will not be subject to withdrawal liability as a result of certain changes in corporate structure described in § 1369(b) if "the change causes no interruption in employer contributions or obligations to contribute under the plan." The changes in corporate structure described in § 1369(b) include the sale of the stock of a subsidiary:

> A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal

45. 94 Stat. 1208, 1209-1210 (1980).

> would be considered to have taken place merely because of the change in ownership of S.[46]

These two safe harbors, which were designed to "moderate and mitigate" the statute's operation[47] are critical to the delicate balance Congress sought to achieve in enacting MPPAA. In order to check the erosion of the contribution bases of multiemployer plans, MPPAA imposes withdrawal liability on employers that cease to contribute on behalf of their employees. But the statute recognizes that changes in ownership will occur, and it *allows* employers to avoid withdrawal by complying with the safe harbor rules and arranging for the new owner to assume the seller's contribution obligations.

At the same time, Congress was concerned that corporate transactions could be abused, leaving the other employers in the multiemployer pension plan "holding the bag."[48] To deal with these abuses, Congress provided withdrawal liability if a principal purpose of any transaction is to evade or avoid that liability.[49] Looking at § 1392(c) in isolation, and reading "principal purpose," "transaction," and "evade or avoid" expansively, it is possible to interpret the section to apply whenever a company structures a sale-of-business transaction to come within either of the statutory safe harbors and thus to "avoid" withdrawal liability. But that interpretation would make the safe harbors illusory and is contrary to the clear meaning of the statute taken as a whole.

Congress did not intend § 1392(c) effectively to nullify § 1384 and § 1398. Section 1392(c) serves a much narrower purpose: to prevent employers from avoiding withdrawal liability through transactions that do not have any real economic substance, other than to avoid withdrawal liability. Representative Frank Thompson, Jr., the principal sponsor of MPPAA in the House, explained § 1392(c) as follows:

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46. H.R. Rep. No. 869, Pt. II, 96th Cong., 2d Sess. 16 (1980), reprinted in [1980] U.S.C.C.A.N. 3005-3006; *see also Teamsters Pension Trust Fund v. Central Mich. Trucking, Inc.*, 857 F.2d 1107, 1109-1110 (6th Cir. 1988); *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 900-902 (3d Cir. 1986); PBGC Opn. Ltr. 92-1 (Mar. 30, 1992); PBGC Opn. Ltr. 85-29 (December 5, 1985); PBGC Opn. Ltr. 82-4 (Feb. 10, 1982).

47. *Connolly v. PBGC*, 475 U.S. 211, 225-226 & n.8 (1986).

48. *Santa Fe Pacific*, 22 F.3d at 730.

49. 29 U.S.C. § 1392(c).

> We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form or control, or through transactions which are less than bona fide and arms length. Hence, for example, a building and construction industry employer — or for that matter any employer contributing to a plan — will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.[50]

By its nature, it is apparent that an employer would need to consider MPPAA withdrawal liability in connection with an asset sale transaction that satisfies the conditions of § 1384. This is because of § 1384's various bonding or escrow requirements and the requirement that the sale agreement expressly reflect the seller's secondary liability if the purchaser should withdraw within the first 5 plan years after the sale. Of course, mere consideration does not indicate an intent to evade or avoid withdrawal liability. Section 1398, however, requires no specific procedures or provisions by which its protection is to be invoked — there are no hoops through which a selling employer must jump. Thus, an employer selling the stock of a subsidiary can benefit from § 1398's protection without giving MPPAA liability any consideration. Indeed, Sherwin-Williams argued and presented evidence to the effect that it never gave more than a passing notice of potential MPPAA liability in its negotiations to sell the stock of Lyons to J.R.C. Section 1398 will apply if the sale causes no interruption in employer contributions or obligations to contribute under the plan.[51] If *other* facts indicate that the sale transaction is a sham to evade or avoid withdrawal liability, then § 1392(c) could be invoked by the plan.

If the Sixth Circuit is correct, then anytime an employer sells the stock of a subsidiary that contributes to a multiemployer plan, and the purchaser subsequently falters, the multiemployer plan will be able to claim, on a presumptively correct basis, that the form of the transaction as a sale of stock is, of and by itself, an indicia of an intent by the seller to evade or avoid withdrawal liability, which, when piled upon other

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50. 126 Cong. Rec. H. 23038 (1980).

51. In the instant case, the New York Fund has never claimed that Sherwin-Williams's sale of the stock of Lyons did not qualify for Section 1398 protection. The New York Fund has only argued that such protection should be set aside based upon application of Section 1392(c).

circumstantial evidence and logical inferences, will be justification for the plan to invoke § 1392(c). Allowing the Sixth Circuit to place employers on this thin ice, which MPPAA was not meant to support, will break the protective coating that Congress intended and, for participating employers, will either expose them to potential drowning in a sea of unintended liability or see them struggling to get out of multiemployer plans, and, for nonparticipating employers, see them unwilling to venture even a toe into the chilly waters of a multiemployer plan. Such was clearly not what Congress intended. This Court must correct the misconstruction which the Sixth Circuit has condoned in this case, or § 1392(c) will be inappropriately applied to transactions which Congress intended be accorded the protection of § 1398.

CONCLUSION

For the foregoing reasons, Petitioner, The Sherwin-Williams Company urges this Court to grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit so that this Court may consider all issues raised by the record.

Respectfully submitted,

RONALD LEO KAHN
Counsel of Record
HAROLD H. READER III
GREGORY A. GORDILLO
ULMER & BERNE LLP
1300 E. 9th Street, #900
Cleveland, Ohio 44114
(216) 621-8400

RON M. TAMBURRINO
The Sherwin-Williams Company
101 Prospect Avenue
Cleveland, OH 44115
(216) 566-2360

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND DECIDED OCTOBER 15, 1998

THE SHERWIN-WILLIAMS COMPANY,
Plaintiff-Appellant,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,
Defendant-Appellee.

No. 97-3840

United States Court of Appeals,
Sixth Circuit

Argued: April 21, 1998

Decided: October 15, 1998

* * *

Before: KENNEDY and BATCHELDER, Circuit Judges; HULL, District Judge.*

OPINION

BATCHELDER, Circuit Judge.

In this case, we must decide whether the district court was correct in affirming the arbitrator's decision that Plaintiff-

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* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Appendix A

Appellant Sherwin-Williams's sale of a wholly-owned subsidiary subjected it to withdrawal liability under section 4212(c) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1392(c). For the reasons that follow, we affirm the judgment of the district court.

I.

In 1987, Sherwin-Williams, a national manufacturer and distributor of paint and paint-related products, paid $14,204,765.79 to purchase 100% of the stock in Lyons Transportation Lines, Inc., a less than truckload ("LTL") carrier. Apparently, Sherwin-Williams was having trouble competing with local and regional paint manufacturers, who enjoyed the advantage of conveniently located service facilities. Sherwin-Williams planned to use Lyons to cut its own transportation and distribution costs by developing a sort of "rolling warehouse" where inventory could be maintained in trucks so as to be immediately available for delivery to local customers.

The plan was less than successful, however, partly because Lyons incurred massive losses in all but a few months of its operation and partly because the trucking company never adequately met Sherwin-Williams's expectations in terms of developing a rolling warehouse. During each year of ownership, Sherwin-Williams had to subsidize Lyons in order to keep the trucking concern afloat. By 1990, these subsidies were as much as $500,000 each month. Sherwin-Williams recognized that it needed to stop the bleeding, either by turning Lyons into a profitable concern or by getting rid of it.

Appendix A

During 1988 and 1989, Sherwin-Williams received several unsolicited offers to purchase Lyons's stock. At meetings during this period, Sherwin-Williams's executives discussed the possible sale of Lyons to one of the unsolicited bidders, but those who were concerned over the problem of withdrawal liability repeatedly counseled against liquidating or just selling the company. For example, Thomas Stout testified:

> And again, it was brought up several times through the year of 1988, the end of the year of '88 . . . and I know it was my understanding at the time, and it was, I'm sure, Sam Hanania's understanding, that our withdrawal liability at that time was 13 or 14 million dollars . . . And we said if you liquidate the company or you sell the company, and that would be initiated, the withdrawal liability is larger than the company, and there would be no benefit from doing it, and those are the kinds of things we talked about. . . . And Sam said, you've got to worry about unfunded liability, it's there, it will raise its head. . . . and Bob [President and General Manager of Sherwin-Williams Transportation Services Division, Robert Kinney] would make the statement, if it happened once it won't happen again. Sherwin-Williams is a large corporation, and we have the wherewithal to fight any litigation that we come up against. . . .

Moreover, Robert Kinney testified that he was aware during 1988 and 1989 that the withdrawal liability associated with Lyons "could be in the neighborhood of 5 to 16 million dollars." In fact, Kinney spearheaded the original move at Sherwin-Williams to acquire a trucking concern in 1986. In a report he

prepared specifically for the acquisition of a common motor carrier, Kinney stated that the issue of withdrawal liability was "one of the most significant financial considerations facing the trucking industry today," but also predicted that "the odds for repeal [of the ERISA provisions on withdrawal liability] are better than even." Kinney's report also listed six main strengths and four main weaknesses of acquiring a trucking concern; two of the four weaknesses listed were "union" and "E.R.I.S.A. obligation."

In May 1989, Kinney commissioned a report on possible ways of turning Lyons around to make it profitable. The report predicted that such a turnaround would take at least three years, during which time Sherwin-Williams would be required to continue to subsidize Lyons. In October 1989, the Sherwin-Williams Board of Directors decided against the time and expense required to make Lyons profitable, and, instead, authorized the sale of Lyons.

About seven months later, Kinney received a letter dated January 12, 1990, from J.R.C. Acquisition Corporation ("JRC"), submitting a proposal to acquire Lyons from Sherwin-Williams. JRC had no assets, no financial backing, and no corporate affiliations, but the proposal identified it as a company formed by Jonathan M. Tendler and Robert M. Castello, the principal officers of Common Brothers, Inc., one of the largest distributors of pharmaceuticals in the tri-state New York metropolitan area, with sales in excess of $200 million. Sherwin-Williams checked with Dunn & Bradstreet, but that firm had no information regarding JRC in the state of New York. Furthermore, Sherwin-Williams knew that JRC was not a subsidiary of Common Brothers, the identification in the proposal of Tendler and Castello notwithstanding.

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Sherwin-Williams also received proposals from other potential purchasers. R.J.M. Associates offered to buy Lyons for $6 million — an offer that was later amended to $8 million. Baytree Investors, Inc., offered to buy all outstanding shares of Lyons's stock for $8.5 million ($2 million cash and the balance as preferred stock, redeemable in 24 months). Arrow Carrier Corporation, a large northeastern motor carrier headquartered in New Jersey, also made a bid.

Despite these other offers, Sherwin-Williams chose to negotiate with JRC. As part of its due diligence, JRC requested a schedule of current pension liabilities as of December 31, 1989, and Lyons sent letters to the Teamsters Fund requesting information on withdrawal liability.[1] On February 22, 1990, JRC and Sherwin-Williams executed a letter of intent outlining a transaction in which JRC would purchase all issued and outstanding stock of Lyons for $7.85 million, contingent on verification that the unfunded ERISA liability of Lyons did not exceed $7 million. Although it approached more than 40 banks and real estate investors, JRC apparently was unable to secure the financing necessary to execute a straight stock-for-

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1. Both the arbitrator and the district court found that Lyons was notified of its potential withdrawal liability "sometime after May 16, 1990." The record indicates that, on February 20, 1990, Lyons sent a letter to the Fund requesting an estimate of Lyons's withdrawal liability. Lyons's letter to the Fund was one of several similar letters sent to various pension funds requesting estimates of withdrawal liability. The record includes responses from several other pension funds, but we have been unable to determine from the record or from the parties' briefs, whether the Teamsters Fund responded to Lyons's letter. The first information contained in the record relative to Lyons's liability to the Fund is the Teamsters Fund letter to Lyons sent on December 11, 1990, stating that Lyons's withdrawal liability had been calculated at $1,606,605.00.

cash deal. Stout testified that investors expressed a number of reasons for their reluctance to finance the deal:

> [T]he worst thing was that it was into the trucking industry and they weren't interested in lending any more money into that industry. Number two, it was too highly leveraged . . . and the operational losses incurred from the first of the year to that point in time had been too high.

In spite of its knowledge of JRC's difficulties, Sherwin-Williams did not consider the other offers, but instead chose to continue its negotiations with JRC. On May 17, 1990, the parties executed an agreement which called for a down payment of $1.6 million, with the balance of $6.25 million payable on a promissory note over the next six years. The promissory note was secured by mortgages on Lyons's real property. Moreover, Sherwin-Williams agreed to contribute approximately $18 million to the paid-in capital of Lyons in order to eliminate certain intercompany accounts between Lyons and Sherwin-Williams. Finally, the agreement contained a warranty on the part of JRC that it had not encumbered or agreed to encumber or grant any lien on Lyons's assets to anyone other than Sherwin-Williams.

The sale closed on June 1, 1990. Prior to that time, on or about May 25, 1990, before it had the authority to do so, and, so far as this record demonstrates, without the knowledge of Sherwin-Williams, JRC and its principals had executed in the name of Lyons an accounts receivable factoring and security agreement with Allstate Financial Corporation. JRC used the proceeds from the Allstate security agreement to make the $1.6 million cash payment to Sherwin-Williams on June 1, 1990. In

short, JRC had no capital or assets of its own with which to subsidize Lyons's monthly losses and it could not obtain financing to do so on the strength of Lyons's assets, because those assets, such as they were, had already been pledged to muster up enough money for the down payment.

Lyons continued to hemorrhage as badly under JRC's control as it had under Sherwin-Williams's. On August 2, 1990, Sherwin-Williams sent Lyons a 30-day termination notice informing Lyons that Sherwin-Williams would no longer accept any freight from Lyons and that from that point on, any line haul or brokerage services would need to be prepaid by Lyons. Then, on September 12, 1990, Sherwin-Williams sent letters to Lyons demanding payments of $74,099.05 for the sublease of certain trailers and $78,125 for the first quarterly payment on the purchase price of Lyons, for which JRC and Lyons were jointly and severally liable.

On October 19, 1990, Lyons and JRC filed Chapter 11 bankruptcy proceedings. Subsequently, the Teamsters Fund sent a letter to Lyons informing it of the possibility of withdrawal liability. On December 11, 1990, the Teamsters Fund sent a letter to Lyons in which it assessed withdrawal liability in the amount of $1,606,605.

Shortly thereafter, the Teamsters Fund sent a letter to Sherwin-Williams demanding payment by Sherwin-Williams of Lyons's withdrawal liability because Sherwin-Williams's principal purpose in selling Lyons's stock was to evade or avoid withdrawal liability under MPPAA. Sherwin-Williams urged the Teamsters Fund to reconsider and also argued that the liability had been incorrectly calculated. After a volley of repeated requests and denials and at least one meeting between the lawyers for the Teamsters Fund and Sherwin-Williams, the

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Teamsters Fund finally revised its calculation of withdrawal liability downward to $477,270. The September 18, 1991 letter informing Sherwin-Williams of the revision, however, also stated that the Teamsters Fund had included so-called "gap year interest" in its new calculation.

Sherwin-Williams paid the assessed amount to the Teamsters Fund, but preserved its objections for arbitration, which it later initiated on July 9, 1991. Sherwin-Williams sought arbitration of two issues: whether a principal purpose of its sale of Lyons's stock was to evade or avoid withdrawal liability and whether the Teamsters Fund was correct to include "gap year interest" in its calculation of liability.

The arbitration hearing, held in October 1993, lasted four days and included the admission into evidence of both testimony and exhibits. On February 7, 1994, the arbitrator issued a 63-page decision finding in favor of the Teamsters Fund on the issue of whether a principal purpose of Sherwin-Williams's sale of Lyons was evasion or avoidance of withdrawal liability, and in favor of Sherwin-Williams on the issue of "gap year interest."

On March 8, 1994, Sherwin-Williams filed an action, pursuant to MPPAA, 29 U.S.C. § 1401(b)(2), in the United States District Court for the Northern District of Ohio, requesting that the court vacate the arbitrator's decision. On February 29, 1996, the magistrate judge issued a report and recommendation in which he recommended that the arbitrator's decision be enforced on both issues. Sherwin-Williams timely filed its objections, but on March 31, 1997, the district court issued a memorandum of opinion and order adopting the findings and recommendations of the magistrate judge.

Sherwin-Williams now appeals the district court's decision.

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II.

The MPPAA provides the procedures for both calculating and assessing liability of an employer withdrawing from a multiemployer pension plan. Among other things, MPPAA provides that withdrawal liability is to be assessed without regard to any transaction entered into by the employer if a principal purpose of that transaction was to avoid or evade that liability. 29 U.S.C. § 1392(c).

The MPPAA provides for resolution of disputes over both calculation and assessment of withdrawal liability by means of arbitration, 29 U.S.C. § 1401(a)(1), and for limited judicial review of the arbitrator's decision resolving such a dispute. 29 U.S.C. § 1401(b)(2). Further, the MPPAA defines the statutory presumptions and limited standard of review to be used in the resolution of a dispute over withdrawal liability. Section 1401(a)(3)(A) provides that a determination of withdrawal liability made by a plan sponsor, such as the Teamsters Fund in the present case, "is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U.S.C. § 1401(a)(3)(A). The Supreme Court has explained that the presumption established by § 1401(a)(3)(A) requires an employer challenging a factual determination made by the plan sponsor to disprove that factual determination by a preponderance of the evidence.[2] *Concrete Pipe & Prods. of Cal.*,

2. In *Concrete Pipe* the employer claimed, *inter alia*, that the effect of the presumptions in § 1401 was to deny the employer an impartial adjudicator, which was a denial of due process. Describing the presumption of § 1401(a)(3)(A) as "meaningless," a "muddle" and "not . . . ambiguity within the usual degree, but . . . incoherence," the Supreme Court avoided constitutional problems with the statute by construing (Cont'd)

Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 629, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). The Court defined the preponderance standard as requiring the arbitrator "to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [arbitrator] of the fact's existence." *Id.* at 622, 113 S.Ct. 2264.

The judicial review provided pursuant to § 1401(b)(2) is extremely narrow, because "[i]n any proceeding under subsection (b) . . . there shall be a *presumption, rebuttable only by a clear preponderance of the evidence*, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c) (emphasis added). Moreover, reviewing courts must give great deference to an arbitrator's determination because of the MPPAA's strong policy favoring arbitration of withdrawal liability disputes. *Mason & Dixon Tank Lines, Inc. v. Central States Pension Fund*, 852 F.2d 156, 163-64 (6th Cir.1988) (stating that arbitration is the "preferred method" for resolving withdrawal liability disputes and that "under the MPPAA 'arbitration reigns supreme' ").

As we have held, "The series of presumptions prescribed by the Multiemployer Act were intended by Congress to 'ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination.' " *Board of Trustees, Mich. United Food &*

(Cont'd)
the presumption as requiring an employer challenging a factual determination made by the plan sponsor to disprove that factual determination by a preponderance of the evidence. *Concrete Pipe*, 508 U.S. at 625, 628, 629, 113 S.Ct. 2264.

Commercial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258, 1260 (6th Cir.1987) (quoting H.R.Rep. No. 869, pt. I, 96th Cong., 2d Sess. 1, 86, reprinted in 1980 U.S.Code Cong. & Admin.News 2918, 2954). Furthermore, deference to the findings of the arbitrator is proper because the arbitrators chosen to resolve the complicated issue of withdrawal liability often have relevant expertise in the field of pension law which can contribute significantly to the accuracy of a decision. *See, e.g., Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405 (7th Cir.1989).

The arbitrator was required to assess the facts of this case in light of the rebuttable presumption in favor of the Teamsters Fund, and the district court, in turn, was required to review the arbitrator's findings of fact for clear error. We must also review the arbitrator's findings of fact for clear error, which means that we will only disturb the arbitrator's findings if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 470 U.S. 564, 570, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In addition, the arbitrator's application of the appropriate burden of evidence is a question of law which we review *de novo*.

A. Findings of Fact

Sherwin-Williams argues first that the arbitrator committed clear error when he determined that a principal purpose of Sherwin-Williams's decision to sell Lyons was to evade or avoid withdrawal liability. This argument is essential to its appeal, since if this finding is erroneous, there is no basis upon which to assess Lyons's withdrawal liability against Sherwin-Williams. According to Sherwin-Williams, the crucial issue,

not addressed by the arbitrator or the district court, is not whether or not Lyons was actually economically viable, but whether Sherwin-Williams believed that Lyons was economically viable.[3] Sherwin-Williams is mistaken.

Lyons's economic viability was relevant to the arbitrator's decision, because the arbitrator found that

> [w]hile the solvency or general fiscal status of Lyons at June 1, 1990 is highly relevant, it is not determinative. The issue presented for resolution is whether Sherwin-Williams sold Lyons to JRC with a principal purpose to evade or avoid the withdrawal liability under the Fund if Lyons were to make a complete or partial withdrawal from the Fund. Solvency obviously bears on the issue. . . . The less 'healthy and viable the corporate entity' at the sale date, the more likely, on a circumstantial basis, that ERISA Section 4212(c) motivations were involved.

Sherwin-Williams argues, however, that if it believed Lyons was economically viable, evading or avoiding withdrawal liability could not have been a principal purpose of the transaction because in that event, it would have had no reason to expect Lyons and JRC to withdraw from the Fund.

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3. Sherwin-Williams makes a similar argument with regard to the economic viability of JRC. This argument is similarly without merit. No matter what Sherwin-Williams claims to have subjectively believed about the financial condition of JRC, the objective evidence, of which the record shows Sherwin-Williams was aware, clearly demonstrated that JRC had neither capital, assets nor financial backing. The arbitrator's findings were not clearly erroneous.

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The arbitrator's analysis makes it clear that he looked to the economically doomed status of Lyons as circumstantial evidence that Sherwin-Williams must have known that Lyons was going to fail the minute Sherwin-Williams cut it loose. It is true that some of Sherwin-Williams's employees testified that they fully expected JRC to be able to turn Lyons into a profitable concern, but it is equally clear that the arbitrator did not find such testimony credible in light of the facts.

> Whether Lyons was insolvent on June 1, 1990 or merely on its financial deathbed is irrelevant. No one can deny it was fiscally moribund. Sherwin-Williams knew that without a deep pocket to subvend its monthly losses, Lyons could not survive.

In other words, Sherwin-Williams must have known that Lyons was going to fail. JRC did not even have enough investors to finance a straight cash-for-stock deal, much less to subsidize Lyons to the tune of $500,000 per month for the three years that Sherwin-Williams predicted it would take to return the company to profitability. Indeed, JRC was forced to pledge Lyons's accounts receivable just to obtain the money needed for the down payment. From where, exactly, did Sherwin-Williams expect JRC and Lyons to obtain the remaining $6.25 million?

The Fund supplied an answer, which the arbitrator believed, and which Sherwin-Williams failed to rebut. Namely, Sherwin-Williams never expected to receive the remaining $6.25 million of the purchase price. Sherwin-Williams originally paid over $14 million to purchase Lyons, but four years later it was accepting an offer of $7.85 million, only $1.6 million of which it could ever realistically expect to see. Such a transaction makes

little sense unless Sherwin-Williams sought to avoid, by means of this transaction, its potential employer withdrawal liability, which it had at various times estimated to be somewhere between $5 million and $16 million.

Thus, Sherwin-Williams's argument that the arbitrator failed to ask whether Sherwin-Williams believed Lyons was economically viable is without merit. The arbitrator looked at the evidence, concluded that Sherwin-Williams must have known that Lyons was going under, and consequently viewed Sherwin-Williams's protestations to the contrary as lacking credibility. The Supreme Court has noted that "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504. Given the cornucopia of evidence demonstrating Lyons's failing health, we cannot say that the arbitrator was wrong to doubt Sherwin-Williams's claims of ignorance as to the financial doom awaiting Lyons.

Next, Sherwin-Williams argues that the arbitrator's findings of facts were erroneous because they were based on flawed logic. Although Sherwin-Williams takes a scattershot approach to introducing the various flaws which it says undermined the validity of the arbitrator's factual findings, we can organize the arguments into two distinct claims: (1) Sherwin-Williams's choice of how to structure the sale of Lyons does not necessarily support the logical inference that a principal purpose of the sale was to evade or avoid withdrawal liability; and (2) the arbitrator should have believed the testimony of the various Sherwin-Williams employees who stated that they were motivated by legitimate considerations other than the evasion or avoidance of withdrawal liability.

According to Sherwin-Williams, the arbitrator wrongly concluded that Sherwin-Williams disposed of Lyons by selling stock because any other alternative would have resulted in withdrawal liability. This, says Sherwin-Williams, is not true. An asset sale structured to comply with 29 U.S.C. § 1384 would not have subjected it to withdrawal liability. We observe, however, that Sherwin-Williams presented no evidence that such an asset sale was a viable alternative. Indeed, Sherwin-Williams went to great pains to explain that the LTL trucking market in the late 1980s was glutted and that Sherwin-Williams would not have been able to obtain a fair price for Lyons's assets on such a market. According to Kinney, "There were 900 plus motor carriers out of business, terminals everywhere, equipment for sale, auctions daily. I think to have even considered an asset sale without the customer base would have been a waste of time." The burden was on Sherwin-Williams to prove that avoidance was not a principal purpose of the transaction. Pointing to the existence of a statute, without proving its applicability to these particular circumstances, is not enough to carry that burden.

Next, Sherwin-Williams argues that the sale of Lyons was authorized on October 20, 1989, before Sherwin-Williams was aware of the withdrawal liability. The arbitrator conceded as much when he stated that there was "no evidence sufficient to support an affirmative intent to violate ERISA § 4212(c) at this point in time." However, the arbitrator never found that avoiding withdrawal liability was the only principal purpose of selling Lyons. No one disputes that Lyons represented a massive drain on Sherwin-Williams's cash-flow and that Sherwin-Williams wanted to stop the bleeding by getting rid of Lyons.

This does not alter the fact, however, that Sherwin-Williams was presented with a number of options for disposing

of Lyons, and that it chose the only one that would not subject it to withdrawal liability. It is undisputed that Sherwin-Williams chose the method of disposing of Lyons after it became aware of the likely dimensions of the potential withdrawal liability. Thus, the decision of the board of directors on October 20, 1989 does nothing to undermine the logical validity of the arbitrator's factual findings.

In addition to attacking the logical inferences drawn from the evidence by the arbitrator, Sherwin-Williams also urges that the testimony proves that Sherwin-Williams had other legitimate motives, and that the existence of these motives contradicts the arbitrator's finding that evading or avoiding withdrawal liability was a principal purpose of the transaction. Again, Sherwin-Williams's argument succeeds only if we read the MPPAA to require that avoidance or evasion of withdrawal liability be "*the* principal purpose" rather than "*a* principal purpose" of the sale.

As the arbitrator correctly pointed out, the language of the MPPAA makes it clear that an employer can have more than one principal purpose in conducting a transaction. This is especially true where, as here, one principal purpose can be said to motivate the decision about whether to sell the company at all, while another principal purpose can be said to motivate the decision about how to sell the company. In the present case, the arbitrator found that Sherwin-Williams's "number one, first reason" for deciding to sell Lyons may have been to eliminate the negative cash flow, but that a principal purpose in selling Lyons to a shell corporation with no assets or corporate affiliations in a highly-leveraged cash-for-stock swap was to evade or avoid withdrawal liability.

After reviewing the exhibits and testimony, as well as the arbitrator's thorough and well-reasoned analysis, we are not left with the firm conviction that a mistake has been made. Without such a firm conviction, we cannot hold the arbitrator's decision to be clearly erroneous.

B. Due Process

Next, Sherwin-Williams argues that the arbitrator must have been impermissibly biased against Sherwin-Williams, as evidenced by the final statements from the arbitrator's decision:

> [Withdrawal liability] may be considered-and if the truth be known, is always considered (or, at least, should always be known and considered)-by competent corporate executives and benefits counsel. . . . [O]nce you realize that Sherwin-Williams is a Fortune 200 company, with knowledgeable experts and personnel and a $7 million issue, you know it was a factor and, in the overall context, "a principal purpose" to be rid of the Title IV liability.

Sherwin-Williams argues that this statement proves that the arbitrator was predisposed to rule against Sherwin-Williams and to reject the testimony of Sherwin-Williams's witnesses.

This "statement" is pieced together out of the final four pages of the arbitrator's 63-page decision and opinion, and included in those final four pages is the arbitrator's strong statement of his finding that Sherwin-Williams's first purpose in selling Lyons was to stop the huge monthly losses. Even considering this patchwork quotation in isolation, we find in it

no indication of bias against Sherwin-Williams. The arbitrator observed that it would be impossible for a company such as Sherwin-Williams not to take withdrawal liability into consideration. In fact, the record is replete with evidence that Sherwin-Williams's employees discussed the issue frequently while deciding what to do about Lyons. The arbitrator opined that "in the overall context" the evasion or avoidance of withdrawal liability was a principal factor. The arbitrator's task is to make precisely that kind of determination; *i.e.*, to determine what, in the overall context, were the employer's principal purposes for undertaking the transaction at issue. The arbitrator's statement is not evidence of bias, but rather the articulation of a conclusion with which Sherwin-Williams disagrees.

Sherwin-Williams's remaining attempts to impugn the arbitrator's objectivity are meritless. In his 63-page opinion, the arbitrator thoroughly analyzed the arguments, evidence and testimony offered by Sherwin-Williams. The arbitrator did eventually rule against Sherwin-Williams, but he was not biased in doing so. If anything, the arbitrator gave Sherwin-Williams an advantage by failing to give the Teamsters Fund the benefit of the required statutory presumption.

C. Statutory Presumptions

Finally, Sherwin-Williams argues that the arbitrator failed to use the appropriate standard in analyzing this case. We agree. As we explained above, the MPPAA requires an arbitrator to presume the correctness of a plan sponsor's determinations with regard to withdrawal liability, including the determination of whether a principal purpose for the withdrawal was to evade or avoid liability, made under § 1392(c). The employer bears the

burden of rebutting this presumption and must prove, by a preponderance of the evidence, that the plan sponsor's determination was incorrect.

Thus, according to the MPPAA as interpreted by the Supreme Court in *Concrete Pipe*, 508 U.S. at 629, 113 S.Ct. 2264, the arbitrator in this case should have started with the presumption that the Teamsters Fund correctly determined that a principal purpose behind Sherwin-Williams's sale of Lyons to JRC was to evade or avoid liability under the MPPAA. The arbitrator should have examined all of the evidence to determine whether a preponderance of that evidence rebutted the presumption. This is not what the arbitrator did.

Instead, the arbitrator held,

> From a careful review of the evidence, it is clear beyond any doubt that each party has introduced a significant volume of credible testimonial and documentary evidence to support its conclusion. While agreeing with the holdings in *Concrete Pipe* and the arguments derived therefrom by the Fund and Sherwin-Williams, this dispute can and will be resolved by the evidence presented at the hearing and without reliance on the statutory presumptions. To couch this conclusion in the language of the precedential opinions, the documentary and testimonial evidence introduced by [Sherwin-Williams] was sufficient to disprove the Fund's factual determination by [sic] preponderance, i.e., the existence of a fact is more probable than its nonexistence, if accepted. The same, however, is true of the evidence actually introduced by the Fund.

Although we agree with Sherwin-Williams that the arbitrator failed to apply the statutory presumption in favor of the Teamsters Fund, we fail to see how this in any way harmed Sherwin-Williams. The arbitrator examined the evidence and made his legal determinations without giving the Teamsters Fund the benefit of a rebuttable presumption in its favor. The standard the arbitrator actually used was more favorable to Sherwin-Williams than the law allows, and the arbitrator still found against Sherwin-Williams. Sherwin-Williams cannot expect to find any more success under a less favorable standard.

The district court found that the arbitrator's findings of fact are not clearly erroneous. We have reviewed the record in this case and conclude that the district court is correct. Applying the statutory presumption of correctness in favor of the arbitrator's findings, as we must do in our *de novo* review of the arbitrator's legal conclusions, we hold that Sherwin-Williams failed to rebut that presumption by a preponderance of the evidence. For this reason, we conclude that the arbitrator's mistake of law with respect to the application of the presumption in favor of the Teamsters Fund was harmless error.

III. Conclusion

For the reasons discussed above, we AFFIRM the decision of the district court affirming in its entirety the decision and opinion of the arbitrator.

APPENDIX B — MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED MARCH 31, 1997

SHERWIN-WILLIAMS COMPANY, Plaintiff,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, Defendant.

No. 1:94 CV 0493.

United States District Court,
N.D. Ohio,
Eastern Division.
March 31, 1997.

* * *

MEMORANDUM OF OPINION AND ORDER

NUGENT, District Judge.

This matter comes before the Court upon the Report and Recommendation of a Magistrate Judge of this Court submitted on February 29, 1996 (Document # 45). The Report and Recommendation is ADOPTED and the decision of the Arbitrator is AFFIRMED.

Plaintiff, Sherwin-Williams Company ("Sherwin-Williams"), filed this action pursuant to 29 U.S.C. § 1401(b)(2), seeking to vacate that portion of an arbitration award favorable to defendant, New York State Teamsters Conference Pension

and Retirement Fund ("Teamsters Fund") and to enforce another portion favorable to Plaintiff. In his ruling, the Arbitrator found that a principal purpose of Plaintiff's sale of the stock of one of its subsidiaries was to evade or avoid withdrawal liability under the Employee Retirement Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA), and thus confirmed Defendant's assessment of withdrawal liability to Plaintiff when its former subsidiary withdrew from the Teamsters Fund by reason of its bankruptcy. The Arbitrator also ruled in Sherwin-Williams' favor that the Teamsters Fund was not entitled to "gap year" interest. Now pending before the Court is the motion of the Teamsters Fund to dismiss the Complaint and to enforce, in part, the arbitration award (Document # 20); and the motion of Sherwin-Williams for summary judgment on its Complaint (Document # 21).

Statement of Facts

Sherwin-Williams is engaged in the manufacture, distribution and sale of coatings and related products. The Teamsters Fund is a multiemployer benefit plan as defined in ERISA, 29 U.S.C. § 1002(37) and is regulated by ERISA as amended by MPPAA. Lyons Transportation Lines, Inc. ("Lyons") was a less-than- truckload ("LTL") regional motor carrier founded in 1928 in Erie, Pennsylvania. Lyons was a participating employer in the Teamsters Fund and was a signatory to a participation agreement which provided the obligation to contribute to the Teamsters Fund. Lyons was also a participating employer in two other Teamster sponsored multiemployer pension plans.

In January, 1987, Sherwin-Williams, through one of its subsidiaries, purchased 100% of the outstanding stock of Lyons

for $14,204,765.79. Plaintiff acquired Lyons because it recognized that transportation costs were a significant factor in an economic environment where the final customer would resist further price increases, thereby favoring local producers with lower distribution costs. Further, Plaintiff knew that its customers refused to carry high levels of inventory but continued to demand a high level of service response, resulting in Plaintiff's local and regional competitors enjoying a geographic service facility advantage. Sherwin-Williams determined that acquiring a regional LTL carrier would enable it to lower distribution costs, to improve service, and provide competitive freight costs. Sherwin-Williams developed a "rolling warehouse" where inventory could be maintained in trucks and be available for prompt delivery to local customers. Finally, after evaluating trends in the motor carrier industry, Plaintiff believed that acquisition of a regional LTL carrier could prove to be a profitable investment.

Contrary to Plaintiff's projections, with the exception of a few months, Lyons incurred substantial losses and failed to meet the objectives for which it was acquired. Sherwin-Williams was forced to subsidize Lyons each year of its ownership in order to sustain Lyons' operations. Lyons financial position was known to people inside and outside the trucking industry due to publicly available information. In 1989, Sherwin-Williams began to receive unsolicited offers for the purchase of Lyons' stock. Several parties expressed interest in purchasing Lyons' stock, including the eventual purchaser, J.R.C. Acquisition Corporation ("JRC").

Following the contacts regarding acquisition of Lyons, Sherwin-Williams reevaluated its acquisition of Lyons' stock and determined that the benefits it anticipated had not accrued.

Appendix B

In or around May of 1989, the President and General Manager of Sherwin-Williams Transportation Services Division, Robert Kinney, asked W.D. James, Lyons' President, to investigate and report on alternative operational and organizational means of making Lyons profitable. Mr. James reported that it would take at least three years to turn Lyons around and make it profitable. Unwilling to spend the time and additional money it would take to keep Lyons for another three years, Sherwin-Williams' Board of Directors authorized the sale of Lyons in October, 1988.

Mr. Kinney received a letter dated January 12, 1990, from JRC, submitting a proposal to acquire Lyons. The JRC proposal identified JRC as a company formed by Jonathan M. Tendler and Robert M. Castello, the principal officers of Commons Brothers, Inc., one of the largest distributors of pharmaceuticals in the tri-state New York metropolitan area, with sales in excess of $200,000,000. Following this communication, Sherwin-Williams provided the principals of Commons Brothers, Inc. and JRC with confidential information relating to the operations of Lyons.

During this time period, Sherwin-Williams also received proposals for the purchase of Lyons from other groups. Mr. Kinney met with individuals on behalf of R.J.M. Associates, Inc. and received an offer to purchase all of the shares of Lyons for $6,000,000, subject to due diligence and negotiation of a definitive agreement. That offer was later amended to $8,000,000.

Sherwin-Williams also received an offer form Baytree Investors, Inc., offering to buy all outstanding shares of Lyons for $8,500,000 consisting of § 2,000,000 cash and the balance

as preferred stock, redeemable in 24 months; subject to due diligence and execution of a definitive purchase agreement.

Sherwin-Williams also negotiated with Arrow Carrier Corporation ("Arrow"), a large northeastern motor carrier headquartered in New Jersey. Sherwin-Williams cut off negotiations with Arrow when it learned of the financial difficulties of Arrow and its president.

After making inquiries with respect to the bidding parties and evaluating each offer, Sherwin-Williams decided to focus on JRC as the most likely bidder for Lyons. Sherwin-Williams proposed that the stock be sold to a wholly owned subsidiary of Commons Brothers, Inc. formed for the acquisition. Mr. Castello and Mr. Tendler insisted that Commons Brothers, Inc. not be the purchaser since it was involved in a concurrent transaction to acquire a French pharmaceutical company.

In its due diligence requests, JRC requested a schedule of current pension liabilities calculated as of December 31, 1989. In response, Lyons sent letters to Defendant and the other funds to which Lyons contributed requesting information with respect to potential withdrawal liability in the event of a complete or partial withdrawal in 1990. The Teamsters Fund provided Lyons with some basic fund data and indicated that for a fee of $500 the Teamsters Fund would calculate the potential withdrawal liability figure. Lyons requested the calculation and received the computations from the Teamsters Fund sometime after May 16, 1990.

JRC and Sherwin-Williams executed a letter of intent on February 22, 1990, for the purchase of all the issued and outstanding stock of Lyons for a cash purchase price of

$7,850,000, contingent on verification that the unfunded ERISA liability of Lyons did not exceed $7,000,000, or such greater amount as the parties agreed upon. The parties executed a definitive Agreement for Sale and Purchase of Stock ("Agreement") on May 17, 1990, reflecting a closing date of May 31, 1990, and calling for a down payment of § 1,600,000, with the balance of $6,250,000 payable in accordance with the terms of a promissory note over a period of six years. The note was secured by mortgages on Lyons' real property. Sherwin-Williams agreed to contribute approximately $18,000,000 to the paid-in-capital of Lyons in order to eliminate certain intercompany accounts between Lyons and Sherwin-Williams. The Agreement provided a representation and warrant from JRC that it had not agreed to encumber or grant any lien on Lyons' assets to anyone other than Sherwin-Williams.

In April, 1990, Mr. Farrell, Mr. Castello and Mr. Tendler formulated and prepared a written business plan for Lyons to improve Lyons and its financial operations. Although Sherwin-Williams was informed of the existence of the business plan, it was not made available to Sherwin-Williams due to concerns about the proprietary and confidential nature of the plan.

The sale closed on June 1, 1990, and the existing officers and directors of Lyons resigned and JRC assumed control of Lyons. JRC installed new directors and officers, none of which had any prior connection with Lyons or Sherwin-Williams. After the sale, Lyons continued to make contributions to the Teamsters fund through August 25, 1990. No contributions were made after August 25, 1990.

Prior to the closing, on or about May 25, 1990, JRC and its principals executed in the name of Lyons an Accounts

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Receivable Factoring and Security Agreement ("Security Agreement") with Allstate Financial Corporation ("Allstate"). There is no tangible evidence that Sherwin-Williams had knowledge of the Security Agreement before Lyons filed for Bankruptcy in October, 1990. However, neither JRC nor its principals had authority before or at the time of the closing to execute such an agreement on behalf of Lyons. Purportedly without the knowledge or approval of Sherwin-Williams, JRC used the proceeds obtained from Allstate to make the cash payment of $1,600,000 on June 1, 1990. From June 1, 1990, until sometime in November 1990, Allstate provided additional funds to Lyons, retained certain accounts receivable payments made to Lyons, and charged financing fees to Lyons.

Lyons continued to have serious operational and financial problems under the control of JRC. After the sale, the divisions of Sherwin-Williams utilizing Lyons' services experienced a downturn in the quality and timeliness of the services. Nevertheless, they continued to use Lyons' services during June and July. However, as a result of Lyons' failure to pay for the services provided by Certfied Distribution Services, Ins. ("CDSI"), Mr. Kinney, the president of CDSI, sent Lyons a 30 day termination notice on August 2, 1990, regarding the cartage agreement between Lyons and CDSI and informed Lyons that effective immediately it would not accept any freight from Lyons, nor would it line haul or perform brokerage services unless such services were prepaid by Lyons.

On September 12, 1990, Sherwin-Williams sent letters to Lyons demanding payments of $74,099.05 due on August 31, 1990, for Lyons' sublease of 119 trailers and of § 78,125 as the first quarterly payment on the purchase price, with respect to which both Lyons and JRC were jointly and severally liable.

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Lyons and JRC filed Chapter 11 bankruptcy proceedings on October 19,1990, in Erie, Pennsylvania. The Teamsters Fund sent a letter to Lyons on November 7, 1990, advising Lyons that there may be some withdrawal liability. At the Teamsters Fund Board of Trustees meeting on November 26, 1990, the board discussed Lyons and authorized its executive administrator to request from Price Waterhouse the withdrawal liabililty for Lyons and to file on behalf of the fund a withdrawal liability claim against Lyons should it be determined by Price Waterhouse that a claim exists. The Teamsters Fund sent a letter to Lyons on December 11, 1990, assessing withdrawal liability against Lyons in the amount of $1,606,605.

Less than a month later, the Teamsters Fund sent a demand letter to Sherwin-Williams demanding that it pay the withdrawal liability assessed against Lyons with respect to Lyons' withdrawal from the Fund on the theory that it had been a principal purpose of Sherwin-Williams in selling Lyons' stock to evade or avoid withdrawal liability.

On March 7, 1991, Sherwin-Williams requested that the Teamsters Fund reconsider its determination that a principal purpose of Sherwin-Williams sale of Lyons' stock was to evade or avoid withdrawal liability and also asserted that the Fund's computations of withdrawal liability were incorrect and requested that the computations be reviewed.

The Teamsters Fund notified Sherwin-Williams on May 13, 1991, that it had reviewed Sherwin-Williams' requests for review and had not changed its position that a principal purpose of the sale was to evade or avoid withdrawal liability. The Fund also stated that its computations of withdrawal liability and its acturial assumptions complied with MPPAA.

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Sherwin-Williams filed a supplement to its request for review with the Fund on July 3, 1991, explaining in greater detail its position that the withdrawal liability had been calculated incorrectly. Counsel for Sherwin-Williams met with the Fund's counsel to discuss the calculations. On September 18, 1991, the Teamsters Fund notified Sherwin-Williams by letter that it had recalculated the Lyons withdrawal liability and determined that the appropriate liability was $477,270, as opposed to the $1,606,605 which it had originally calculated. In computing the withdrawal liability in its revised assessment, the Teamsters Fund included so-called "gap year interest," which is a year's interest from the December 31, 1989, determination date (as to the Teamsters fund's unfunded vested liabilities) to the assumed first payment date of January 1, 1991, in the amount of $35,795. While preserving its objections, Sherwin-Williams paid the Teamsters Fund for its withdrawal liability assessment in the amount of § 515,806.09.

Sherwin-Williams initiated arbitration on July 9, 1991, alleging two issues for resolution by the arbitrator. First, was the Teamsters Fund correct in determining that a principal purpose of Sherwin-Williams sale of Lyons' stock to evade or avoid withdrawal liability? Second, should the Teamsters Fund have included "gap year interest" in the amount of $35,795 in its final calculation of withdrawal liability?

The Arbitrator was selected by the parties in accordance with the Rules of the American Arbitration Association. The arbitration hearing was held over a four day period in October, 1993, in Cleveland, Ohio. Testimony and exhibits were admitted into evidence. The parties submitted pre-hearing and post-hearing briefs to the Arbitrator. The Arbitrator issued a 63 page Decision and Opinion on February 7, 1994, finding in favor of

the Teamsters Fund on the first issue that the Teamsters Fund's determination that a principal purpose of Sherwin-Williams' sale of Lyons' stock was to evade or avoid withdrawal liability. The Arbitrator found in favor of Sherwin-Williams on the second issue concluding that the Teamsters Fund should not have included "gap year interest" in its withdrawal liability calculation, and thus, Sherwin-Williams was entitled to a refund of § 35,795 plus interest.

Sherwin-Williams filed this action on March 8, 1994, pursuant to MPPAA, 29 U.S.C. § 1401(b)(2), requesting that this Court vacate the Arbitrator's principal purpose determination and find that a principal purpose was not to evade or avoid withdrawal liability and enforce the Arbitrator's decision that gap year interest' should not be included in the withdrawal liability calculation. The Teamsters Fund filed a counterclaim against Sherwin-Williams seeking enforcement of the Arbitrator's principal purpose determination and vacation of the Arbitrator's ruling regarding "gap year interest". The case was assigned to Judge Lesley B. Wells. Defendant filed a Motion to Dismiss the Complaint and to enforce in part the Arbitration Award. Plaintiff filed a Motion for Summary Judgment. Both parties filed briefs in support of their motions and in opposition to the other parties' motion. Sixteen binders of documents, transcript and exhibits from the arbitration proceeding were submitted in conjunction with the motions. The case was referred to Magistrate Jack B. Streepy for a Report and Recommendation on the pending motions by Judge Lesley B. Wells on February 17, 1995. The case was reassigned to this Court on July 12, 1995.

The Magistrate Judge issued his Report and Recommendation ("R & R") on February 29, 1996,

recommending that the decision of the Arbitrator be enforced as to both he "gap year interest" and the imposition of withdrawal liability against Sherwin-Williams. Plaintiff filed a five page Summary of Objections to the R & R and a thirty-four page document titled "Objections to R & R" on March 14, 1996. Defendant filed a Response to Plaintiff's Summary of Objections on March 28, 1996. Plaintiff filed a Reply to Defendant's Response on April 3, 1996. Defendant filed another Response to Plaintiff's Objections to R & R on May 24, 1996. Plaintiff responded with another Reply in Support of its Objections to R & R on June 3, 1996. Defendant filed a Responsive Brief and Plaintiff filed a Supplemental Brief to apprise Court of decision of the U.S. Court of Appeals for the 7th Circuit on July 19, 1996. On October 3, 1996, Plaintiff filed for leave to file an affidavit of Ron M. Tamburrino and exhibits in opposition to Defendant's Motion to Dismiss and in support of Plaintiff's Motion for Summary Judgment. Defendant filed a Response to Plaintiff's Motion to file affidavit in support of its Motion for Summary Judgment on November 25, 1996. Plaintiff filed a Reply to Defendant's Response on December 5, 1996. The case is now exhaustively briefed and ready for decision.

Standard of Review for Magistrate Judge's Report and Recommendation

The applicable district court standard of review for a magistrate judge's Report and Recommendation depends upon whether objections were made to that Report. When objections are made to a Report and Recommendation of a magistrate judge, the district court reviews the case *de novo*. Fed.R.Civ.P. 72(b) provides this standard of review; it states, in pertinent part, the following:

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> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Accordingly, this Court will review the Reports and Recommendation, to which timely objections have been filed, *de novo. See Massey v. City Ferndale*, 7 F.3d 506 (6th Cir.1993).

Standard of Review of Arbitrator's Award

It is important to note that the above standard of review for a Magistrate Judge's Report and Recommendation is distinct from the standard of review of an Arbitrator's ruling and award under MPPAA. A district court may not conduct a *de novo* review of the findings of fact made by the Arbitrator. MPPAA provides that upon completion of arbitration proceedings, any party thereto: "may bring an action in a federal district court to enforce, vacate, or modify an award." 29 U.S.C. § 1401(b)(2).

MPPAA further provides that:

> in any proceeding under subsection (b) *there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.* 29 U.S.C. § 1401(c). (Emphasis added.)

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Courts have interpreted the statutory presumption in favor of the arbitrator with respect to his findings of fact to require a district court to review those findings based on the "clearly erroneous" standard. *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir.1993), *Aff'd*, 513 U.S. 414, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995). "Clearly erroneous" means that the reviewing court has a definite and firm conviction that a mistake has been committed. *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *Santa Fe Pacific Corp. v. Central States Pension Fund*, 22 F.3d 725, 727 (7th Cir.), *cert denied*, 513 U.S. 987, 115 S.Ct. 483, 130 L.Ed.2d 396 (1994.) ("A finding is clearly erroneous if the reviewing court, after duly acknowledging the superior proximity of the fact finder to the witnesses, is firmly convinced that the finding is erroneous.")

Under the clearly erroneous standard of review, a court may not reverse the fact-finder's decision, even if it might come to a different conclusion, if the fact-finder's account of the evidence is plausible in light of the record viewed in its entirety. *See, Anderson v. Bessemer*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985). The question for the reviewing court is not whether it concurs with the arbitrator's decision but instead whether, on the entire record, it is left with the definite and firm conviction that a mistake has been committed. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

While factual findings of the arbitrator are presumed to be correct, the court is to review the arbitrator's conclusions of law de novo. *Trustees of Amalgamated Ins. Fund v. Geltman Industries, Inc.*, 784 F.2d 926 (9th Cir.), *cert. denied*, 479 U.S. 822, 107 S.Ct. 90, 93 L.Ed.2d 42 (1986).

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MPPAA contains no explicit standard of review for mixed questions of law and fact. While courts differ on the correct standard of review of mixed questions of fact and law, the better reasoning supports the position that mixed questions of fact and law fall under the clearly erroneous standard of review. *Chicago Truck Drivers Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1410-11 (7th Cir.1989); *Jos. Schlitz Brewery Co.*, 3 F.3d 994 (The dominant theme in MPPAA's resolution process is deference to the person who hears the evidence. Thus, an arbitrator's decision on mixed questions of fact and law may be set aside only for clear error.)

In *Chicago Truck Drivers Pension Fund*, the Seventh Circuit analyzed the appropriate standard of review for mixed questions of fact and law and determined that in light of MPPAA's strong policy favoring arbitration of withdrawal liability disputes, great deference must be given to an arbitrator's determinations. This is particularly true on the issue of whether a principal purpose of a transaction was to evade or avoid withdrawal liability, where the arbitrator's fact finding and pension law expertise can contribute significantly to a decision. *Chicago Truck Drivers Pension Fund*, 890 F.2d 1405, 1410-11. Thus, mixed questions of fact and law, such as the issue of whether a principal purpose of a transaction was to evade or avoid withdrawal liability, must be reviewed under a clearly erroneous standard. *Id.*

Accordingly, this Court will review the Arbitrator's decision with respect to the issue of "whether a principal purpose of Plaintiff's sale of Lyons' stock was to evade or avoid withdrawal liability" under a clearly erroneous standard. The Arbitrator's decision regarding "gap year interest" is a question of law and thus will be reviewed *de novo*.

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I. Principal purpose to evade or avoid withdrawal liability

MPPAA was designed to prevent employers from withdrawing from multiemployer pension plans without paying their share of unfunded, vested benefit liability, thereby threatening the solvency of such plans. *Manufacturers' Indus. Relations Ass'n v. East Akron Casting Co.*, 58 F.3d 204 (6th Cir.1995). Specifically, 29 U.S.C. § 1381(a) provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Moreover, MPPAA further provides that:

> *If principal purpose of any transaction is to evade or avoid liability* under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c) (emphasis supplied). Thus, Sherwin-Williams is liable for Lyons' complete withdrawal from the Teamsters Fund and the ensuing withdrawal liability assessed against Lyons, if a principal purpose of its sale of the stock of Lyons to JRC was to evade or avoid withdrawal liability.

The Arbitrator, after listening to all the testimony and reviewing all the records, exhibits and briefs, determined that while evasion of withdrawal liability was not the principal purpose for the Lyons transaction, there were legitimate business reasons to support it; the avoidance of $7,000,000 in

possible withdrawal liability was a principal purpose in the transaction. The Magistrate Judge, after examining the record before the Arbitrator and the parties' briefs and exhibits, agreed that the Arbitrator's finding that a principal purpose of the Lyons' transaction was to evade or avoid withdrawal liability was not clearly erroneous. This Court concurs.

Sherwin-Williams has submitted several objections to the Magistrate Judge's R & R. First, Plaintiff asserts that the Arbitrator applied the wrong standard of review and burden of proof. Sherwin-Williams contends that the Arbitrator's decision that the dispute could be resolved by the evidence presented at the hearing without reliance on the statutory presumptions contained in 29 U.S.C. § 1401(a)(3)(A) actually created a higher burden than required by MPPAA. Under 29 U.S.C. § 1401(a)(3)(A), the Teamsters Fund's determination that a principal purpose of Sherwin-Williams' sale of Lyons stock was to evade or avoid withdrawal liability "is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."

Plaintiff claims that it met the required burden of proof under 29 U.S.C. § 1401(a)(3)(A) as interpreted by the Supreme Court in *Concrete Pipe and Products of California, Inc.*, 508 U.S. 602, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). The Arbitrator did not attempt to dispute the requirements of 29 U.S.C. § 1401(a)(3)(A) or *Concrete Pipe*, rather, he listened to the testimony and reviewed the evidence of both parties, and without reference to a presumption, determined that the evidence adduced by the Teamsters Fund in support of its determination that Plaintiff had a principal purpose to avoid withdrawal liability was stronger than the evidence presented

by Plaintiff that it did not have such a principal purpose. Thus, the burden applied by the Arbitrator in this case was certainly not higher than the burden set forth in MPPAA; if anything, it was probably more favorable to Plaintiff.

Sherwin-Williams also objects that the Arbitrator's findings of fact were clearly erroneous. Specifically, Plaintiff contends that the Arbitrator improperly inferred proof of intent from proof of facts known to Plaintiff. The Arbitrator concluded that Sherwin-Williams had a principal purpose to avoid withdrawal liability upon finding that Sherwin-Williams knew nine fairs. Plaintiff objects that there is no credible evidence supporting four of the nine factors

Two of the factors considered by the Arbitrator concerned the economic viability of Lyons. The Arbitrator determined based on the evidence presented to him that (a) Lyons could not survive without someone underwriting its monthly losses; and (b) that although Lyons may have been "solvents", it clearly was not an economically viable operation in mid-1990. Sherwin-Williams argues that it had no knowledge that Lyons was not economically viable. Despite its own history with Lyons, Sherwin-Williams argues that under new management Lyons could have survived independently without someone underwriting Lyons' monthly losses. Sherwin-Williams submitted several witnesses in the arbitration proceeding who claimed that Lyons could become successful eventually and that Lyons would enjoy increased sales and less losses. The Arbitrator listened carefully to these witnesses and determined their credibility and the value of their testimony. Given the nearly overwhelming past losses of Lyons and the failure of IRC to even make a dent in that losing history during its short duration as owner, the Arbitrator's factual findings regarding Lyon's economic viability are not clearly erroneous.

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Next, Plaintiff argues that the Arbitrator's determination that "JRC was a shell corporation, also without economic viability" was clearly erroneous. The evidence submitted regarding the Lyons transaction reflects that IRC had no capital or financial backing and had to seek financing through an independent source. JRC sought financing from some 40 or more banks or real estate investors and could not obtain financing for its first offer of $7,850,000 cash for Lyons. When JRC informed Sherwin-Williams it could not obtain financing for the original deal, Plaintiff agreed to renegotiate the deal as a highly leveraged buy out for § 1,600,00 cash, obtained through Allstate secured by Lyons' accounts receivables, and the remaining 6,250,000 payable over six years. Further, Plaintiff knew that Dunn and Bradstreet had no information regarding JRC in the state of New York, but did not investigate further. Finally, Plaintiff knew that JRC was not a wholly owned subsidiary of Common Bros. Inc. and thus, Common Bros. had no legal obligation to loan money to, or otherwise subsidize, JRC. Certainly, from the information available at the time of the hearing, it was not clearly erroneous for the Arbitrator to find that JRC was a shell corporation.

Sherwin-Williams has submitted an affidavit of one of its attorneys attaching some financial records of Common Brothers, obtained by Plaintiff after the Arbitrator issued his Decision and Award and after the Magistrate Judge issued his R & R. The records purport to show some transfers of money from Common Brothers to LTL, which Plaintiff asserts is Lyons Transportation Lines. The financial documents were obtained by Sherwin-Williams through discovery in the course of Common Brothers' bankruptcy proceedings. Plaintiff asserts that this new evidence proves that JRC had Common Brothers' financial backing and thus was not a shell corporation. The

financial records do not prove that JRC (or Lyons) was a subsidiary of Common Brothers or that Common Brothers had any legal obligation to support or sustain JRC. At most the records reflect that there may have been some basis for Sherwin-Williams' hope that Common Brothers would help back-up JRC if it needed support.[1] This evidence is insufficient to support Plaintiff's claim that it did not know or believe that JRC was not economically viable, when it was clear at the time of the transaction that JRC was not a wholly owned subsidiary of Common Brothers and that Common Brothers could not be involved in the transaction. Accordingly, even with Plaintiff's new evidence, the Arbitrator's finding regarding JRC's economic viability is not clearly erroneous.

Finally, Plaintiff asserts that the Arbitrator's findings with respect to the final two factors are not supported by the evidence. The Arbitrator's final two findings were:

> (d) that once the transaction was recast from $7,850,000 cash at closing to $1,600,000 down and the balance over six years and secured by Lyons' assets, in view of the problems in the industry, the monthly losses of Lyons as an operating entity and the shell nature of IRC, it was unlikely that Sherwin-

1. Defendant objects to the introduction of new evidence at this point of the process, as this Court is functioning as a reviewing court and not as a fact-finder. Defendant asserts that MPPAA intends the sole fact finder to be the arbitrator, not the reviewing court. Moreover, even if MPPAA permitted this Court to review new evidence, Defendant argues that Plaintiff has not met the standard for the admission of new evidence set by Fed.R.Civ.P. 60(b). Defendant's objections are well taken; however, to ensure completeness and to avoid any potential future issue, the Court has reviewed the new evidence and has determined that it would not change the Arbitrator's decision.

> Williams would ever receive more than § 1,600,000 or so cash for Lyons; and
>
> (e) that $1,600,000 cash plus avoidance of $7,000,000 of contingent employer withdrawal liability made $8,600,000, the consideration Sherwin-Williams deemed a fair price for Lyons. (If there was a miracle on Lake Erie and Sherwin-Williams received the $7,850,000 plus the employer withdrawal liability relief of $7,000,000, it got all its money back——unlikely as that seemed.)

Arbitrator's Decision and Opinion at 62. Sherwin-Williams argues that there is no evidence that it "knew" it would never receive more than $1,600,000 cash for Lyons, especially in light of the fact that it turned down or failed to pursue other offers for Lyons which would pay more cash. The Arbitrator was aware of the other offers and drew his conclusions regarding the value of these offers during the course of the evidentiary hearing. The fact that the Arbitrator made the disputed finding despite the existence of those other offers does not make the findings clearly erroneous.

Similarly, Plaintiff argues that it was unreasonable to find that Sherwin- Williams deemed $1,600,000 cash plus the avoidance of § 7,000,000 of contingent withdrawal liability a fair price for Lyons. Again Plaintiff refers to its other offers for Lyons and the fact that the actual withdrawal liability for all three funds Lyons contributed to was less than $7,000,000. The Arbitrator reviewed all of the evidence, listened to four days of testimony and concluded that given Lyons' continuing significant monthly losses and lack of economic viability, JRC's lack of capital or financial assets and its failure to obtain

significant financing along with the downturn in the trucking industry in general it was likely that even if Lyons managed to scrape by month to month, it would not be in a position to pay its debt to Plaintiff. That finding is not unreasonable much less clearly erroneous.

The Arbitrator's finding that a principal purpose of the Lyons' transaction was to evade or avoid withdrawal liability is not clearly erroneous. Accordingly, the Magistrate Judge's recommendation that the Arbitrator's "principal purpose" finding be affirmed is adopted.

II. Arbitrator Bias Violated Due Process

Sherwin-Williams contends that the Arbitrator was predisposed to find that Sherwin-Williams had the intent to evade or avoid withdrawal liability thus depriving Sherwin-Williams of due process. Plaintiff points to two statements in the Arbitrator's Decision:

> [Withdrawal liability] may be considered—and if the truth be known, is always known and considered (or, at least, should be known and considered)—by competent corporate executives and benefits counsel. Arbitrator's Decision and Opinion at 60.
>
> * * *
>
> [O]nce you realize that Sherwin-Williams is a Fortune 200 company, with knowledgeable experts and personnel and a $ 7 million issue, you now it was a factor and, in the overall context, "a principal purpose" to be rid of the Title IV liability. Arbitrator's Decision and Opinion at 63.

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These limited passages taken out of context do not demonstrate that the Arbitrator prejudged the case. Plaintiff states that although the first statement at page 60 of the Arbitrator's Decision was made in the context that "mere consideration [of withdrawal liability] is not a principal purpose, per se", Sherwin-Williams contends that its argument, made at the hearing, that it never considered withdrawal liability at all, never had a chance. That is not the case. The Arbitrator heard and considered all of Sherwin-Williams' testimony and argument during the hearing. It was his role to determine the credibility of the testimony and the value of the evidence he heard. He made those judgments and made his findings based upon the evidence and the law. There is nothing in these two statements to show that the Arbitrator had prejudged the withdrawal liability issue.

Plaintiff also contends that the Arbitrator did not give sufficient weight to the testimony of some of its witnesses regarding the ability of IRC to turn Lyons around. The Arbitrator's failure to give the appropriate amount of credibility and weight to this testimony demonstrates the Arbitrator's "poisoned view of the facts." Plaintiff's Objections at 27. Again, it is the function of the arbitrator under the system set up by Congress in MPPAA to weigh the credibility of witnesses and determine the appropriate weight afforded each piece of evidence and testimony. The Arbitrator fulfilled this function according to the standards set forth in MPPAA. It is not for this Court to second guess the Arbitrator's first hand impressions of credibility and weight of the evidence. As the Magistrate Judge determined, Plaintiff has not established any due process violation.

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III. Gap Year Interest

The Teamsters Fund seeks to vacate that portion of the Arbitrator's Decision which found that the Teamsters Fund should not have assessed "gap year" interest in the amount of $35,795 against Plaintiff. As the Magistrate Judge correctly noted, the Arbitrator's decision that MPPAA does not permit assessment of gap year interest was confirmed by the Supreme Court in *Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co.*, 115 S.Ct. 981 (1995).

Conclusion

For the reasons stated, the Report and Recommendation of the Magistrate Judge (Document # 45) is ADOPTED and Plaintiff's Motion for Summary Judgment is DENIED IN PART with respect to the Arbitrator's affirmation of the assessment of withdrawal liability against Plaintiff, and GRANTED IN PART with respect to Plaintiff's request to enforce the Arbitrator's Decision regarding gap year interest. Defendant's Motion to Dismiss the Complaint is GRANTED IN PART with respect to the issue of withdrawal liability and DENIED IN PART with respect to gap year interest. The Arbitrator's Decision and Opinion is AFFIRMED in its entirety.

IT IS SO ORDERED.

JUDGMENT ENTRY

Pursuant to a Memorandum of Opinion and Order of this Court, Plaintiff's Motion for Summary Judgment (Document # 21) is DENIED IN PART with respect to the Arbitrator's affirmation of the assessment of withdrawal liability against

Plaintiff, and GRANTED IN PART with respect to Plaintiff's request to enforce the Arbitrator's Decision regarding gap year interest. Defendant's Motion to Dismiss the Complaint (Document # 20) is GRANTED IN PART with respect to the issue of withdrawal liability and DENIED IN PART with respect to gap year interest.

The Report and Recommendation of the Magistrate Judge (Document # 45) is ADOPTED and the decision of the Arbitrator is AFFIRMED.

IT IS SO ORDERED.

APPENDIX C — REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE JACK B. STREEPY DATED AND FILED FEBRUARY 29, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

1:94CV0493

JUDGE DONALD C. NUGENT
(Magistrate Judge Jack B. Streepy)

SHERWIN-WILLIAMS CO.

Plaintiff

v.

THE NEW YORK STATE TEAMSTERS, et al.

Defendants

REPORT AND RECOMMENDED DECISION
OF MAGISTRATE JUDGE

STREEPY, MAG. J.

Plaintiff, Sherwin-Williams Company (Sherwin-Williams) brings this action pursuant to 29 U.S.C. § 1401(b)(2), seeking to vacate that portion of an arbitration award favorable to defendant, New York Teamsters Conference and Pension Fund (Teamsters Fund), and to enforce another portion. The major issue relates to the arbitrator's ruling that Sherwin-Williams

sought to evade or avoid a pension liability eventually owed to the Teamsters Fund under the Employee Retirement Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA), when a former subsidiary of Sherwin-Williams withdrew from the pension plan by reason of its bankruptcy. Now pending is the motion of the Teamsters Fund (doc. 20) to dismiss the complaint and to enforce, in part, the arbitration award; and the motion of Sherwin-Williams (doc. 21) for summary judgment.

In January 1987, Sherwin-Williams acquired a subsidiary known as Lyons Transportation Lines, Inc. (Lyons), a less-than-truckload motor carrier. Sherwin-Williams intended to use Lyons, in part, for delivery of paint and related products thereby lowering costs and improving service to its customers.

Contrary to projections, Lyons incurred losses during the first two years after acquisition and otherwise failed to meet the objectives for which it was acquired. In or about May of 1989, Sherwin-Williams concluded it would take approximately three-years to make Lyons profitable and that the rewards of such efforts would not be commensurate with the costs. Thus, in October of 1989, Sherwin-Williams decided to sell Lyons and began to evaluate various unsolicited offers which it had received from potential purchasers.

Among the entities to submit a bid for Lyons was J.R.C. Acquisition Corporation (JRC), a company formed by Jonathan Tendler (Tendler) and Robert Castello (Castello). Tendler and Castello were also principal officers and shareholders of Common Brothers Incorporated (CBI), a distributor of pharmaceuticals in the Tri-State-New York area with sales in excess of $200,000,000.

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Initially, Sherwin-Williams intended for Lyons to be sold to a wholly-owned subsidiary of CBI in a cash for stock transaction at a price of $7,850,000, payable at closing. In subsequent negotiations, Castello and Tendler insisted that JRC, which was not a wholly-owned subsidiary of CBI, purchase Lyons, in order to avoid any negative impact on CBI's concurrent attempts to acquire a French pharmaceutical company.

On May 17, 1990, Sherwin-Williams and JRC executed an agreement for the sale and purchase of Lyons stock and closed the sale on June 1, 1990. The payment terms provided for a $1,600,000 down payment from JRC, with the balance of $6,250,000 to be paid over six years.

Lyons' financial difficulties continued. In August of 1990, JRC ceased making required contributions to the various pension plans to which Lyons was obligated, including the Teamsters Fund, and failed to meet the deadline for its first installment under the purchase agreement. In October of 1990, both JRC and Lyons filed for Chapter 11 bankruptcy protection.

Thereafter, the Teamsters Fund assessed pension liability against Lyons in the amount of $1,606,605 and demanded that Sherwin-Williams pay that sum as withdrawal liability under MPPAA based on the conclusion that a principal purpose of Sherwin-Williams' decision to sell Lyons to JRC was to evade or avoid withdrawal liability.

Sherwin-Williams denied it was liable for the Lyons pension obligation, thus on July 9, 1991, it initiated arbitration proceedings against the Teamsters Fund pursuant to 29 U.S.C. § 1401(l). Sherwin-Williams raised two issues for resolution

by the arbitrator: (1) whether the Teamsters Fund was correct in its determination that a principal purpose motivating Sherwin-Williams, sale of Lyons was evasion or avoidance of withdrawal liability; (2) whether the Teamsters Fund had properly included "gap year" interest in its final calculation of Sherwin-Williams' withdrawal liability.

The arbitrator upheld the Teamsters Fund on the first issue. On the second issue, the arbitrator ruled in favor of Sherwin-Williams.

Pursuant to 29 U.S.C. § 1401(b)(2), upon completion of arbitration proceedings "any party thereto may bring an action, . . . in an appropriate United States district court . . . to enforce, vacate, or modify the arbitrator's award." Sherwin-Williams seeks to vacate the arbitrator's principal purpose determination and to enforce his gap year interest ruling. The Teamsters Fund seeks the opposite.

I. Withdrawal Liability

The MPPAA was added to ERISA 'to cure the problems arising when an employer cease[s] making payments to a pension plan fund . . .,"*Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258, 261. (7th Cir. 1989), and provides in part "[i]f an employer, withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. §1381(a).

Most relevant to this action, section 1392(c) provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability

shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c). A parent corporation and its subsidiary are treated as one employer for purposes of assessing withdrawal liability. 29 U.S.C. 1301(b)(1). Thus, if a principal purpose behind the transaction (the sale of Lyons) was evasion or avoidance of potential withdrawal liability, the parent corporation (Sherwin-Williams) may be held liable for the eventual withdrawal liability of the subsidiary (Lyons) even after the sale is complete.[1]

In reviewing an arbitration decision there is a "presumption, rebuttable only by a clear preponderance of the evidence, that findings of fact made by the arbitrator were correct." 29 U.S.C. 1401(c). This legislative language triggers the "clearly erroneous" standard, and it applies both to findings of fact and mixed questions of fact and law such as a ruling on withdrawal liability. *Chicago Truck Drivers Pension Fund v. L. Zahn Drug*, 890 F.2d 1405, 1409-11 (7th Cir. 1989); *see also*, *Santa Fe Pacific v. Central States Pension Fund*, 22 F.3d 725, 726-27 (7th Cir.), *cert. denied*, 115 S.Ct. 483 (1994). "A finding is clearly erroneous if the reviewing court, after duly acknowledging the superior proximity of the fact finder to the witnesses, is firmly convinced that the finding is erroneous." *Santa Fe*, 22 F.3d at 727.

The arbitrator found that the principal purpose of Sherwin-Williams in selling Lyons to JRC was financial, primarily to stop monthly losses reaching as much as $500,000 per month in the operation of Lyons. If withdrawal liability was dependent upon finding that *the* principal purpose in selling Lyons was to

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1. Withdrawal liability will not be imposed if other circumstances occur, *see e.g.*, 29 U.S.C § 1384. Those circumstances are not present in this case.

evade or avoid withdrawal liability, Sherwin-Williams would not be liable. However, MPPAA only requires that *a* principal purpose of the sale was to evade or avoid withdrawal liability. *Id.* The arbitrator concluded Sherwin-Williams had such a purpose based upon finding that Sherwin-Williams knew the following nine factors (arbitrator's decision at 61-62):

> (1) that Lyons participated in three multiemployer, defined benefit, employee pension benefit plans subject to Title IV of ERISA;
>
> (2) that if Lyons effected a complete withdrawal from said plans the withdrawal would trigger the withdrawal of liability;
>
> (3) that the liability to all three plans in the aggregate could reach $7,000,000;
>
> (4) that a sale of stock would, on its face, allow Sherwin-Williams to rid itself of Lyons and the monthly subventions without triggering the liability under Title IV;
>
> (5) that Lyons could not survive without someone underwriting its monthly losses;
>
> (6) that although Lyons may have been "solvent," it clearly was not an economically viable operating entity in mid-1990;
>
> (7) that JRC was a shell corporation, also without economic viability;

(8) that once the transaction was recast from $7,850,000 cash at closing to $1,600,000 down and the balance over six years and secured by Lyons' assets, in view of the problems in industry, the monthly losses of Lyons as an operating entity and the shell nature of JRC, it was unlikely that Sherwin-Williams would ever receive more than $1,600,000 or so *cash* for Lyons; and

(9) that $1,600,000 cash plus avoidance of $7,000,000 of contingent employer withdrawal liability made $8,600,000 the consideration Sherwin-Williams deemed a fair price for Lyons. (If there was a miracle on Lake Erie and Sherwin-Williams received the $7,850,000 plus the employer withdrawal liability relief of $7,000,000, it got all its money back — unlikely as that seemed.)

The primary issues raised by Sherwin-Williams are: (1) the testimony of the relevant Sherwin-Williams officers reflect that it was clearly erroneous to find that the evasion or avoidance of withdrawal liability was a principal purpose behind the sale, and (2) it was clearly erroneous to find that Sherwin-Williams knew the second, third and seventh factors noted by the arbitrator.

The Officers' Testimony

Regarding the testimony of Sherwin-Williams' officers, the issue is purpose, which is a state of mind inferred from their testimony and other evidence. *Santa Fe*, 22 F.3d at 727. As noted above, the purpose of escaping withdrawal liability did not have to be the only purpose, it need only have been a

principal purpose, *i.e.*, one of the factors that weighed heavily in the thinking of Sherwin-Williams. The definition of "a principal purpose" is, see *Santa Fe*, 22 F.3d at 727-28.

> The clear import of "a principal" is to let the employer [Sherwin-Williams] off the hook even if one of his purposes was to beat withdrawal liability, provided however that it was a minor, subordinate purpose, as distinct from a major purpose. To let the employer off even if avoiding such liability was a major purpose, it would ill serve the statute's goal of preventing one employer from unloading his pension obligations on to the other employers in a multi-employer plan.

Assuming there is evidentiary support for the above nine factors noted by the arbitrator, it was not clearly erroneous for the arbitrator to infer therefrom that Sherwin-Williams had as a principal purpose in selling Lyons to JRC the evasion or avoidance of withdrawal liability, irrespective of the officers' testimony.

Knowledge of $7,000,000 Withdrawal Liability

The second and third factors that withdrawal liability could reach $7,000,000 can be jointly analyzed.

Robert E. Kinney, the President and General Manager of Sherwin-Williams Transportation Services Division, was one of the Sherwin-Williams officials who decided to sell Lyons. A 1986 report prepared by him (in connection with an acquisition unrelated to Lyons) describes ERISA obligations "as one of the most significant financial obligations faced by

the trucking industry today" and advises that "S-W should weigh the financial impact of ERISA carefully in any acquisition move." (Binder 11, Ex. 77, sec. V at 5.) A legal opinion contained in that report specifically addresses withdrawal liability. (*Id.*, VII.A. at 6.)

Thomas Stout, the controller for Lyons at the time of the sale, testified that withdrawal liability of Lyons was addressed several times in staff meetings attended by Kinney. Stout testified Kinney was "well aware of the impact and ramifications of withdrawal liability" (Binder 4, Stout test., H.T. at 407; *see also, id.*, at 402-061 421-23).

In addition, Dennis Tocci, in-house counsel for Sherwin-Williams, states that withdrawal liability was an issue in the sale of Lyons. Specifically, he stated it was a potential liability not unlike any other contingent liability when there is the sale of a business. (Binder 4, Tocci test., H.T. at 552-53.)

Stout also testified he made Kinney aware that if Lyons were closed or sold, Sherwin-Williams could incur between $13,000,000 and $14,000,000 in liability. (Binder 4, Stout test., H.T. at 422.) Similarly, Kinney testified that at the time Lyons was approved for sale estimates of withdrawal liability ranged between $5,000,000 and $16,000,000. (Binder 4, Kinney test., H.T. at 510.)

On February 22, 1990, JRC and Sherwin-Williams signed a letter of intent. (Bind 10, Ex. 20.) It conditioned JRC's obligation to execute the purchase agreement for Lyons on verifying that the unfunded ERISA liability does not exceed $7,000,000, "or such greater amount as [JRC and Sherwin-Williams] . . . may agree." (*Id.* at ¶7(g).)

The above evidence is sufficient to conclude that the second and third factors are not clearly erroneous.

Knowledge of JRC

The seventh factor is that Sherwin-Williams knew JRC was a shell corporation without economic viability.

JRC agreed to pay Sherwin-Williams $7,850,000 for Lyons. Initially, Sherwin-Williams was told in the February letter of intent, signed by Castello on behalf of JRC, that it was going to receive full payment at the closing of the purchase agreement. (*Id.* at ¶1; Binder 3, Coy testimony, H.T. at 94.)

Subsequently, JRC principals informed Sherwin-Williams that after contacting 40 banks and real estate investors, JRC was unable to obtain financing for purchase of Lyons. (Binder 4, Kinney testimony, H.T. 460-61.) As a result, Sherwin-Williams agreed to JRC's suggested restructuring of the purchase. There would be a, $1,600,000 down payment, followed by installment payments for the $6,250,000 balance over six years. (Binder 4, Kinney testimony, H.T. 461-62; binder 10, exhibit 36, 40.)

Sherwin-Williams knew JRC was not able to make the down payment from its own funds. Rather, the payment was going to come from personal funds of the JRC principals. (Binder 3, Coy testimony, H.T. 258.)

Sherwin-Williams also knew that a Dunn and Bradstreet report reflected there was no information regarding JRC in the State of New York. (Binder 10, Ex. 11; binder 3, Coy testimony, H.T. 223-25.) Nonetheless, Sherwin-Williams did not seek any further Dunn and Bradstreet report regarding JRC. (*Id.* at 225.)

Appendix C

Sherwin-Williams knew that JRC was not a wholly owned subsidiary of CBI. (Binder 10, exhibit 48, at II.C.) In other words, Sherwin-Williams knew that CBI was not obligated to loan money to, or otherwise subsidize, JRC.

The above evidence reflects that Sherwin-Williams knew JRC was not economically viable. Sherwin-Williams argues it knew that JRC had a business plan to return Lyons to profitability, and this plan constitutes "significant evidence" of JRC's economic viability. (Sherwin-Williams' mem. supp. summ. j. at 9.)

When informed of the JRC business plan, Sherwin-Williams requested a written copy. JRC refused on the ground that if Sherwin-Williams saw the business plan, it would not sell Lyons. (Binder 3, Coy testimony, H.T. 126-27; binder 4, Kinney testimony, H.T. 467-68.) The JRC principals only orally informed Sherwin-Williams that Lyons would become profitable in 12 to 19 months after the sale., (Binder 3, Coy testimony, H.T. 127-28.)

The failure of Sherwin-Williams to obtain a copy of the JRC business plan for the purpose of analyzing its merits meant Sherwin-Williams had no written evidence that JRC was economically viable, thus capable of paying the balance of $6,250,000 over six years, and capable of avoiding a trigger of withdrawal liability. The personal assurances from the JRC principals could reasonably be met with skepticism, particularly in view of JRC's inability to pay the entire purchase price at the June 1 closing, despite Castello's assurance to do so, as set forth in the February 22 letter of intent.

Appendix C

The above analysis of the evidence is not the only possible interpretation; however, it is a reasonable interpretation. The unseen (apparently to this very day) JRC business plan does not constitute sufficient evidence to conclude that the seventh factor is clearly erroneous.

It is unnecessary to consider the remaining issues raised by Sherwin-Williams. The conclusion of the arbitrator that Sherwin-Williams had a principal purpose to evade or avoid withdrawal liability is not clearly erroneous, *i.e*, one is not firmly convinced the finding is erroneous.

Due Process

Citing *Concrete Pipe and Prods. of California, Inc. v. Constr. Laborers Pension Trust*, 113 S.Ct. 2264 (1993), Sherwin-Williams contends that the arbitrator prejudged the outcome, thereby depriving Sherwin-Williams of due process. *Concrete Pipe* requires that the adjudicator must be neutral and detached to satisfy due process. *Id.* at 2277-78.

Sherwin-Williams relies primarily on the following quotations from pages 60 and 63 of the arbitrator's decision:

> [MPPAA withdrawal liability] may be considered — and *if truth be known, is always known and considered* (or, at least, always should be known and considered) — by competent corporate executives and benefits counsel. . . . (Arb. op. at 60.) [Emphasis added by Sherwin-Williams.]

*****

> once you realize that Sherwin-Williams is a Fortune 200 company with knowledgeable experts and personnel and a $7,000,000 issue, *you know it was a factor* and, in the overall context, "a principal purpose' to be rid of the Title IV liability. (Arb. op. at 63.) [Emphasis added by Sherwin Williams.)

The quoted portion from page 60 was made in the overall context of noting that "[m]ere consideration (of withdrawal liability) is not a principal purpose, per se" (Arb. op. at 60), a statement which is favorable to Sherwin-Williams.

The quoted portion from page 63 is preceded in the same sentence by "once you consider the five factors at pages 61-62. . . ." These factors are findings six through nine, noted earlier. The quoted language does not suggest prejudgment.

Sherwin-Williams has failed to show a due process violation.

II. Gap Year Interest

Sherwin-Williams also seeks summary judgment to enforce the ruling of the arbitrator denying gap year interest to the Teamsters Fund in the amount of $35,795. The arbitrator concluded that the assessment of this interest was contrary to MPPAA, thus disallowed it. (Arb. op. at 21-30.)

Sherwin-Williams contends that the Teamsters Fund's request to vacate this portion of the arbitrator's decision has been waived because it was not timely raised. It is unnecessary to consider this procedural issue since the recent decision in *Milwaukee Workers' Pension Plan v. Joseph Schiltz Brewing*

Co., 115 S.Ct. 991 (1995), essentially confirmed the legal determination of the arbitrator.

RECOMMENDATION

It is recommended that the decision of the arbitrator be enforced both as to gap year interest and imposition of withdrawal liability.

DATED: FEB 29 1996

s/ Jack B. Streepy
Jack B. Streepy
United States Magistrate Judge

* * *

APPENDIX D — DECISION AND OPINION OF THE AMERICAN ARBITRATION ASSOCIATION DATED FEBRUARY 7, 1994

AMERICAN ARBITRATION ASSOCIATION

MPPAA Arbitration
Case No. 53-621-0002-91

Arbitrator Marc Gertner

In the Matter of the Arbitration Between

THE SHERWIN-WILLIAMS COMPANY,

Claimant,

and

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND

Respondent.

DECISION AND OPINION

This is an arbitration proceeding initiated by The Sherwin-Williams Company ("Sherwin-Williams"), Claimant, by the filing of a written Demand for Arbitration dated July 9, 1991, together with an appended Summary of Dispute. The arbitration was instituted against New York State Teamsters Conference Pension and Retirement Fund ("Fund"), Respondent. The Arbitrator was selected in accordance with the Rules of the American Arbitration Association in

conjunction with the International Foundation of Employee Benefit Plans and duly qualified. The arbitration hearing was held over a period of four days in Cleveland, Ohio.

Sherwin-Williams is an Ohio corporation with its principal office in Cleveland, Ohio and engaged in the manufacture, distribution and sale of coatings and related products. The Fund is a multiemployer plan as defined in ERISA Section 3(37), 29 U.S.C. §1002(37). Lyons Transportation Lines, Inc. ("Lyons") was a participating employer in the Fund and was signatory to a participation agreement which provided the obligation to contribute to said Fund. Lyons was also a participating employer in two other Teamsters-sponsored multiemployer pension plans, the Western Pennsylvania plan and the Central States Teamsters plan.

On January 23, 1987, Sherwin-Williams consummated a transaction by which a subsidiary purchased 100 percent of the outstanding stock of Lyons Group, Inc. from the Lyons Group, Inc. Employee Stock Ownership Plan and Trust and certain individual shareholders. Lyons Group, Inc. was the holding company for, among other companies, Lyons, a less-than-truckload ("LTL") motor carrier founded in 1928 in Erie, Pennsylvania. The purchase price for the shares was $14,204,765.79.

Sherwin-Williams acquired Lyons as part of its strategy, adopted in early 1986, to acquire a regional LTL carrier. The two major motivating considerations behind Sherwin-Williams' strategy were:

(a) Sherwin-Williams' recognition that transportation costs were a significant factor in an

economic environment where the final customer would resist further price increases, thereby favoring local producers with lower distribution costs; and

(b) Sherwin-WIlliams' knowledge, that customers refused to carry high levels of inventory but continued to demand a high level of service response, resulting in Sherwin-Williams' local and regional competitors enjoying a geographic service facility advantage.

Sherwin-Williams determined that acquiring a regional LTL carrier would enable it to lower distribution costs, to improve service, and provide competitive freight costs.

Sherwin-Williams' evaluation of trends in the motor carrier industry also suggested that acquisition of a regional LTL carrier could also prove to be a profitable investment. It foresaw a decline in the number of LTL bulk motor carriers. Therefore, Sherwin-Williams anticipated that surviving LTL carriers would be able to establish a selective customer base and favorable pricing, while capital intensity would generally prohibit entry by smaller entities. Further, it anticipated that future growth in private carriage into the LTL market would be limited by lack of terminal facilities or freight volume necessary to justify terminal operation in relation to competitive pricing by nonaffiliated firms. Also, Sherwin-Williams developed the concept of a "rolling warehouse" whereby inventory would be maintained in trucks and be available for prompt delivery to local customers,

After Sherwin-Williams acquired Lyons, Lyons' delivery network increased steadily. Contrary to projections, however,

from the time of its acquisition, with the exception of a few months, Lyons was losing money due to the unanticipated intense price competition experienced in the transportation industry. Approximately two years after its acquisition, Lyons sought approval from the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO for implementation of a wage reduction profit-sharing plan which was ratified by 92 percent of the total votes, resulting in adoption of an Addendum to the National Master Freight Agreement and supplements.

Sherwin-Williams was unable to operate Lyons as a profitable division during its tenure of ownership. Sherwin-Williams "absorbed" Lyons' monthly losses to sustain Lyons' operations. Sherwin-Williams "subsidized" Lyons each year of ownership, including the first five months of 1990 when Lyons was generating losses approximating $500,000 per month. By Sherwin-Williams' own admission, had it ceased absorbing Lyons' losses and subsidizing Lyons' operations, Lyons would have ceased operations and gone out of business.

Lyons' financial position was known to persons inside and outside the trucking industry due to publicly available information. As a result, in 1989 Sherwin-Williams began to receive unsolicited offers for the purchase of Lyons' stock. Specifically, in February of 1989, Robert Kinney, President and General Manager of Sherwin-Williams Transportation Services Division, was contacted by attorney A. David Millner on behalf of New Era Transportation, Inc. regarding the possible acquisition of Lyons. This was followed up by further conversations and a subsequent letter of July 10, 1989 from Mr. Millner to Mr. Kinney discussing acquisition of Lyons by Arrow Carrier Corporation ("Arrow"), a large northeastern

motor carrier headquartered in New Jersey. Following further discussions, on September 12, 1989, Mr. Kinney received correspondence from Anthony F. Matarazzo, President of Arrow, expressing serious interest in pursuing discussions and negotiations regarding possible acquisition of Lyons. Mr. Kinney was aware that Arrow and Mr. Matarazzo had recently concluded the acquisition of Holmes Route USA and three smaller LTL carriers.

Following the contacts regarding acquisition of Lyons, Sherwin-Williams reevaluated its acquisition of Lyons' stock and came to the conclusion that its "rolling warehouse" strategy had not proven successful and that the benefits anticipated had not accrued to Sherwin-Williams as a result of such acquisition. In and about May of 1989, Mr. Kinney asked W. D. James, Lyons' President, to investigate and report on alternative operational and organizational means of making Lyons profitable. Mr. James reported to Mr. Kinney that it would take at least three years to turn Lyons around and make Lyons profitable.

In an effort to alleviate Lyons' losses and make it profitable, Sherwin-Williams did explore and investigate cutting back operations, holding freight, adding sales, and stabilizing rates, all to no avail. Sherwin-Williams considered implementing a three-year plan to return Lyons to profitability; however, this program would have required significant effort and the rewards did not seem commensurate. Therefore, the decision was made to pursue the possible sale of Lyons. In October of 1989, Sherwin-Williams' Board of Directors authorized the sale of Lyons.

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As a result, Mr. Kinney made certain information regarding Lyons available to Mr. Millner on behalf of Arrow and Mr. Matarazzo in connection with their due diligence regarding possible acquisition of Lyons. These negotiations continued and, on or about November 30, 1989, Mr. Kinney received a letter from Mr. Matarazzo on behalf of Arrow confirming interest in the acquisition of Lyons' stock and identifying additional items to be resolved. However, after learning of Bowman Transportation's bankruptcy in late 1989 and Mr. Matarazzo's concomitant financial difficulties, Mr. Kinney cut off any further negotiations involving Mr. Matarazzo and Arrow.

By letter dated December 11, 1989, Lyons received correspondence from Patrick J. McNally of Baytree Investors, Inc. Lyons agreed to provide information to Baytree on a confidential basis. By letter dated January 12, 1990, Mr. Kinney received correspondence from J.R.C. Acquisition Corporation ("JRC"), a purported affiliate of Commons Brothers, Inc., submitting a proposal to acquire Lyons. The JRC proposal identified JRC as a company formed by Jonathan M. Tendler and Robert M. Castello, the principal officers of Commons Brothers, Inc., one of the largest distributors of pharmaceuticals in the Tri-State-New York metropolitan area, with sales in excess of $200,000,000. This offer proposed to combine the experience of Mr. Tendler and Mr. Castello with Thomas Farrell's extensive experience in the transportation industry and continuing efforts of the Lyons management team in such a way as to produce good prospects of turning Lyons around and continuing its operations. Following this communication, Sherwin-Williams provided the principals of Commons Brothers, Inc. and JRC with confidential information relating to the operation of Lyons.

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By letter dated January 25, 1990, Mr. Kinney was contacted by Joseph Librizzi and certain other individuals of behalf of R.J.M Associates, Inc. expressing serious interest in pursuing discussions and negotiations towards possible acquisition of Lyons. Following a meeting to further explore this interest, by letter dated, February 8, 1990, Mr. Kinney received an offer from Mr. Millner on behalf of R.J.M. Associates, Inc. to purchase all of the stock of Lyons for $6,000,000, subject to further due diligence and negotiation of a definitive agreement. This was followed by a February 13, 1990 letter to Mr. Kinney from Mr. Millner on behalf of R.J.M. Associates, Inc. amending the offer to an all-cash purchase of $8,000,000.

Also, by letter dated February 12, 1990, Sherwin-Williams received correspondence from Christopher A. Jansen, President of Baytree Investors, Inc., offering to purchase all of the outstanding shares of Lyons for a purchase price of $8,500,000 consisting of $2,000,000 cash and the balance as preferred stock, redeemable in 24 months. This offer was subject to completion of due diligence and execution of a definitive purchase agreement.

Ultimately, after making inquiries with respect to the bidding parties and evaluation of each offer, Sherwin-Williams decided to focus on JRC as the most likely bidder for Lyons. Although Sherwin-Williams had originally proposed that the stock of Lyons be sold to a wholly owned subsidiary of Commons Brothers, Inc. formed for the acquisition, Mr. Castello and Mr. Tendler insisted that Commons Brothers, Inc. not be the purchaser, since Commons Brothers, Inc. was involved in a concurrent transaction to acquire a French pharmaceutical company.

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Sherwin-Williams received a comprehensive due diligence request from JRC relating to its interest in acquiring Lyons. Among other things requested was a schedule of current pension liabilities calculated as of December 31, 1989. In response to this request, by letters dated February 20, 1990, Mr. James transmitted a letter to the Fund and to the other multiemployer pension plans to which Lyons contributed requesting information with respect to potential withdrawal liability in the event of a complete or partial withdrawal in 1990. In response to Mr. James' letter, the Fund provided him some basic Fund data by its letter dated February 23, 1990 and indicated that for a fee of $500 the Fund actuary would calculate the potential withdrawal liability figure. This request was made by Lyons on April 26, 1990, and Lyons received the computations from the Fund sometime after May 16, 1990.

On February 22, 1990, Sherwin-Williams and JRC executed a letter of intent for the purchase of all the issued and outstanding stock of Lyons for a cash purchase price of $7,850,000. The obligation of JRC to execute the Stock Purchase Agreement was conditioned, among other things, upon verification that the unfunded ERISA liability of Lyons did not exceed $7,000,000, or such greater amount as the parties agreed upon. Subsequent to this there were no further agreements or negotiations between the parties relating to multiemployer pension plan obligations. On or about March 1, 1990, the decision of Sherwin-Williams to sell Lyons to JRC was communicated to all Lyons' employees by written announcement.

Negotiations between Sherwin-Williams and JRC culminated in the May 17, 1990 execution of a definitive Agreement for Sale and Purchase of Stock ("Agreement")

reflecting a closing date of May 31, 1990 and calling for a down payment of $1,600,000, with the balance of $6,250,000 payable in accordance with the terms of a promissory note calling for payments over a period of six years. The note was secured by mortgages on Lyons' real property. As a part of the sale, Sherwin-Williams agreed to contribute, as of the closing, approximately $18,000,000 to the paid-in capital of Lyons in order to eliminate certain intercompany accounts between Lyons and Sherwin-Williams. The Agreement also contained a provision in which JRC represented and warranted that it had not agreed to encumber or grant any lien on Lyons' assets to anyone other than Sherwin-Williams.

Sometime in April of 1990, Mr. Farrell, Mr. Castello and Mr. Tendler formulated and prepared a written business plan for Lyons to be used to improve Lyons and its financial operations. Although Sherwin-Williams was generally apprised by representatives of Commons Brothers, Inc. or Lyons of the existence of the business plan, they declined to make the plan available to Sherwin-Williams, due to concerns about the proprietary and confidential nature of the plan. As a result, Sherwin-Williams' representatives were aware of the existence of the plan, but they did not review or approve the plan.

Prior to consummation of the transaction, Mr. Farrell and his legal counsel met at the offices of William J. McCarthy, General President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO in Washington, D.C., and obtained assurances that after its acquisition of Lyons' stock, JRC would be permitted to continue Lyons' wage reduction profit sharing plan, since JRC regarded this as a significant element of its economic forecast.

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The sale contemplated by the Agreement closed on June 1, 1990. Upon the closing of the Agreement, the existing officers and directors of Lyons resigned, JRC assumed control of Lyons, and it installed new directors and officers. The directors were John Tendler, Robert Castello, Thomas Farrell and Frederick Kirschner; the officers were Thomas Farrell, President, Frederick Kirschner, Secretary, and Joseph Acosta, Assistant Secretary. None of these individuals had any prior connection with Lyons or Sherwin-Williams. After the sale, Lyons continued to make contributions to the Fund, but no contributions were made by Lyons after August 25, 1990.

Prior to the closing, on or about May 25, 1990, JRC and its principals executed in the name of Lyons an Accounts Receivable Factoring and Security Agreement ("Security Agreement") with Allstate Financial Corporation ("Allstate") of Richmond, Virginia. Before the filing of Lyons' bankruptcy proceedings in October of 1990, there is no tangible evidence that Sherwin-Williams had knowledge of the existence of the Security Agreement. Also, neither JRC nor its principals had authority before or at the time of the closing to execute such an agreement on behalf of Lyons. Without the knowledge or approval of Sherwin-Williams, JRC used proceeds obtained from Allstate to make the cash payment of $1,600,000 on June 1, 1990. From June 1, 1990 until sometime in November of 1990, Allstate provided additional funds to Lyons, retained certain accounts receivable payments made to Lyons, and charged financing fees to Lyons.

Under the control of Mr. Farrell and JRC, Lyons began to encounter numerous problems. Those problems compounded to the point that they diverted the attention of Lyons' key management away from the basic operation of its LTL business.

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Subsequent to Sherwin-Williams' sale of Lyons' stock to JRC, the divisions of Sherwin-Williams utilizing Lyons' services experienced a deterioration of the delivery and service levels provided by Lyons. Nevertheless, during June and July of 1990 the Consumer, Automotive and Sprayon Divisions continued to use Lyons, even though deliveries were on time only 60 percent to 70 percent of the time from the Consumer Division's major terminal.

As a result of Lyons' failure to pay for the services provided by Certified Distribution Services, Inc. ("CDSI") after the sale of Lyons' stock, by letter dated August 2, 1990 to Mr. Farrell at Lyons, Mr. Kinney, as President of CDSI, provided 30 days' notice of termination of the cartage agreement between Lyons and CDSI and advised Lyons that effective immediately it would not accept any freight from Lyons, nor would it line haul or perform brokerage services unless such services were prepaid by Lyons.

By letters dated September 12, 1990, Sherwin-Williams corresponded with Lyons, demanding payments of $74,099.05 due on August 31, 1990 with respect to Lyons' sublease of 119 trailers and of $78,125.00 as the first quarterly payment on the purchase price, with respect to which both Lyons and JRC were jointly and severally liable. On October 19, 1990, Lyons and JRC filed Chapter 11 bankruptcy proceedings in Erie, Pennsylvania. On November 7, 1990, the Fund sent a letter to Lyons advising that ". . . there may be an Employer Withdrawal Liability." On November 26, 1990, the Fund's Board of Trustees discussed Lyons, and the minutes of the meeting state:

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Employer Withdrawal Liability Matters:

a) *Lyons Transportation Lines, Inc.*:

> Company ceased contributing to the Fund on August 25, 1990. Price Waterhouse has been requested to calculate the withdrawal liability;
>
> Following a discussion, a Union Trustee made a motion authorizing Executive Administrator Sgaglione to request from Price Waterhouse the withdrawal liability for Lyons Transportation Lines, Inc. and for Mr. Sgaglione to file, in behalf of the Fund, a withdrawal liability claim against Lyons should it be determined by Price Waterhouse that a claim exists. Seconded by an Employer Trustee and unanimously approved by the Trustees.

On December 11, 1990, the Fund sent a letter to Lyons assessing withdrawal liability against Lyons in the amount of $1,606,605. On February 4, 1991, the Fund wrote to Sherwin-Williams and demanded that Sherwin-Williams pay the $1,606,605 in withdrawal liability which had been assessed against Lyons with respect to Lyons' withdrawal from the Fund. The Fund asserted this liability against Sherwin-Williams on the theory that it had been a principal purpose of Sherwin-Williams in selling Lyons' stock to evade or avoid withdrawal liability.

On March 7, 1991, Sherwin-Williams requested that the Fund review its determinations. Specifically, Sherwin-Williams requested that the Fund reconsider its determination that a principal purpose of the sale of Lyons' stock to JRC was to

evade or avoid liability. Further, Sherwin-Williams contended that the Fund's computations of withdrawal liability were incorrect, that the Fund's actuarial assumptions and methods utilized in determining the unfunded vested benefits of the Fund for purposes of determining an employer's withdrawal liability, when viewed in the aggregate, were unreasonable and requested that the Fund review its computation of withdrawal liability and the reasonableness of its actuarial assumptions.

By correspondence dated May 13, 1991, the Fund indicated that after its review of Sherwin-Williams' request for review, it had not changed its position that a principal purpose of the sale of Lyons' stock was to evade or avoid liability. Additionally, the Fund stated that its computation of withdrawal liability and its actuarial assumptions complied with MPPAA.

By correspondence dated July 3, 1991, Sherwin-Williams filed a supplement to its request for review with the Fund. This supplement explained in greater detail Sherwin-Williams' position that the Fund had miscalculated Lyons' withdrawal liability and had used unreasonable actuarial assumptions and methods. On July 11, 1991, counsel for Sherwin-Williams discussed with the Fund's counsel, his client's belief that the Fund had miscalculated Lyons' withdrawal liability as a result of, among other things, failing to take into account surplus assets resulting from the merger of the Fund with the Brewery Workers' Pension Plan. In computing the withdrawal liability reflected in its revised assessment letter of September 18, 1991, the Fund included the so-called "gap year interest," being a year's interest from the December 31, 1989 determination date (as to the Fund's unfunded vested liabilities) to the assumed first payment date of January 1, 1991 in the amount of $35,795.

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After Sherwin-Williams' supplement and subsequent discussions with the Fund's counsel, by correspondence dated September 18, 1991, the Fund indicated that it had recalculated the Lyons withdrawal liability. Specifically, the Fund determined that the appropriate liability was $477,270, as opposed to the $1,606,605 which it had originally calculated. As a result of this recalculation, Sherwin-Williams had overpaid the Fund in an amount equal to $51,614.15, which amount has been refunded to Sherwin-Williams.

The parties agreed and stipulated prior to the commencement of the arbitration proceeding that there were three issues to be resolved by the Arbitrator:

1. How do the statutory presumptions of correctness as to determinations by the Fund apply in this case and what do they do to the burden of proof?

2. Was the Fund's calculation of the alleged withdrawal liability attributable to Lyons correctly calculated generally and specifically as to the imposition of gap year interest?

3. In the sale and conveyance of the common stock of Lyons to JRC, was there a principal purpose to evade or avoid withdrawal liability?

Sherwin-Williams contended that there was not as "a principal purpose" the avoidance or evasion of employer withdrawal liability in the sale of Lyons to JRC; in fact, there was not any kind of purpose. Rather, the Claimant urged that Sherwin-Williams wanted to put to an end to the losses that Lyons sustained and Sherwin-Williams underwrote for all of the three and one-half years Sherwin-Williams owned Lyons;

an admission that the policies and strategies employed in the acquisition were not realized and were abandoned. Further, Sherwin-Williams argued that the Fund's computation of the withdrawal liability generally was flawed by the calculation and imposition of gap year interest, i.e., interest for the one-year period commencing with the end of the plan year immediately preceding the year in which the withdrawal of Lyons occurred to the end of that plan year.

The Fund's position was diametrically opposed thereto. The Fund argued that Sherwin-Williams and its key corporate and transportation services division personnel were aware that if Lyons were closed and/or placed in a voluntary bankruptcy proceeding or liquidated or disposed of by an asset sale (other than in conformity with an ERISA Section 4021 sale of assets) it would result in a withdrawal which would trigger an employer withdrawal liability assessment by every collectively bargained, jointly trusteed, defined benefit pension plan with unfunded vested benefits and that Sherwin-Williams pursued, documented and concluded a sale of Lyons' stock with a principal purpose to evade or avoid its employer withdrawal liability to the Fund. Although the Fund admitted that it could produce no "smoking gun" to prove its allegations of an intent to evade or avoid, the facts of the case, taken together, clearly indicate an irrefutable conclusion that Sherwin-Williams sold Lyons, a defunct legal entity, to JRC in a stock sale with a principal purpose to evade or avoid the withdrawal liability to the three Teamsters plans. Finally, the Fund urges that its calculation of Lyons' withdrawal liability, and specifically the inclusion of gap year interest, was presumptively and actually prudent, proper and correct.

The first issue stipulated by the parties deals with the effect of the statutory presumptions of validity contained in ERISA Section 4221(a)(3)(A) and (B), to wit:

> (3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —
>
> > (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
> >
> > (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

Indeed, as the Fund argued, the statutory provisions of MPPAA make clear that the burden of proof is on the employer to show by a preponderance of the evidence that the plan sponsor's determinations were unreasonable or clearly erroneous. The presumptions are designed to ensure the enforceability of employer withdrawal liability assessments and to avoid lengthy and costly litigation which so seriously threatened their solvency prior to MPPAA's enactment. See 4 U.S. Code

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Congressional and Administrative News, p. 2954, 96th Congress.

Both parties cite with approval and rely significantly upon the recent decision of the United States Supreme Court in *Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. __, 113 S.Ct. 2264 (16 EBC 2265) (June 14, 1993), which upheld MPPAA's presumptions without equivocation. Both parties are correct in their reading and application of the opinion, since they each rely on it for different holdings.

The Fund cites *Concrete Pipe* for upholding the validity of the two statutory presumptions. With regard to the first [Section 4221(a)(3)(A)], the court held that the presumption of correctness afforded to a plan sponsor's determination is a reasonable and rational means of enforcing MPPAA and does not deny a withdrawn employer due process. In enacting MPPAA, Congress intended to shift the burden of persuasion over a plan sponsor's determination to the employer. *Concrete Pipe* at 2274, 2278. The court reasoned that:

> It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged.

Id. at 2277. Therefore, the court concluded that MPPAA's presumption of the correctness of the plan sponsor's withdrawal liability determination does not violate an employer's due process since MPPAA simply places the burden on the employer to disprove the challenged determination by a preponderance

of the evidence that said determination was unreasonable or clearly erroneous. *Concrete Pipe* at 2278.

In addition, the court also upheld the second presumption relating to the calculation of withdrawal liability [Section 4221(a)(3)(B)]. This presumption provides that

> the determination of a plan's unfunded vested benefits for a plan year, [is] presumed correct unless a party contesting the determination shows by a preponderance of the evidence that —
>
> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

In reviewing this section, the court held that said presumption did not deny a withdrawn employer due process. *Concrete Pipe* at 2280, 2281. The court reasoned that since assumptions and "methodology is a subject of technical judgment, within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation." *Concrete Pipe* at 2280, 2281. "Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate reasonable) is simply a burden to show that the combination of methods and

assumptions employed in the calculation would not have been acceptable to a reasonable actuary." *Id.* See also in accord, *Mangan and Owen Truckmen, Inc.*, 7 EBC 1353 (February 12, 1986) (Schwartz, Arb.); *Oolite Industries, Inc. and Central States Pension Fund*, 8 EBC 2009 (June 27, 1987) (Cornelius, Arb.); *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985, en banc); *Terson Co., Inc. v. Bakery Drivers Local 194 Pension Fund*, 4 EBC 2024 (D.N.J. 1983).

However, Claimant notes that the court, after holding:

> Congress intended to shift the burden of persuasion to the employer in a dispute over a sponsor's factual determination. This objective can be realized . . . by construing the presumption to place the burden on the employer to *disprove a challenged factual determination by a preponderance*. [Emphasis supplied.]

(*Id.* at 2283) then described the "preponderance" burden as follows:

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistency before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' " *In re Winshop*, 397 U.S. 358 371-372 (1970).

Id. at 2274.

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From a careful review of the evidence, it is clear beyond any doubt that each party has introduced a significant volume of credible testimonial and documentary evidence to support its analysis of the facts and its conclusion. While agreeing with the holdings in *Concrete Pipe* and the arguments derived therefrom by the Fund and Sherwin-Williams, this dispute can and will be resolved by the evidence presented at the hearing and without reliance on the statutory presumptions. To couch this conclusion in the language of the precedential opinions, the documentary and testimonial evidence introduced by Claimant was sufficient to disprove the Fund's factual determination by preponderance, i.e., the existence of a fact is more probable than its nonexistence, if accepted. The same, however, is true of the evidence actually introduced by the Fund.

A second issue for resolution as stipulated by the parties is the issue of the inclusion of pre-demand or gap year interest in the Fund's calculation of the Lyons withdrawal liability assessment.

The Fund has briefed and argued in support of this position most energetically and eloquently. It relies strongly on one of the early MPPAA withdrawal arbitration cases, *Loomis Armored, Inc. and Central States Pension Fund*, 8 EBC 1899 (May 12, 1987) (Tilove, Arb.), in which the arbitrator held that ERISA permits multiemployer pension funds to charge interest on an employer's withdrawal liability for the first year after the unfunded vested benefits valuation date until the first payment is presumed to have been made for purposes of establishing a payment schedule. *Id.* at 1920, 1921. In that case, an employer partially withdrew from the Central States Pension Fund in 1983 and was assessed a withdrawal liability in 1985. Under ERISA Section 4205(a), a partial withdrawal is

considered to occur on the last day of the plan year in which the events which comprise the partial withdrawal occur. Therefore, Loomis' partial withdrawal was considered to occur on December 31, 1983.

The dispute arose in part when Central States accrued interest from December 31, 1982 to arrive at the withdrawn employer's payment schedule. Loomis argued that interest should not have begun to accrue until the demand for payments was actually made in 1985. The plan argued, however, that the amount of liability was established as of December 31, 1982 (the liability date as defined above), as required by ERISA Section 4219, for a withdrawal occurring in 1983. The plan also argued that the amortization schedule properly included interest from that valuation date to the date when the first annual payment is presumed to have been made (January 1, 1984). The arbitrator rejected Loomis' argument and concluded that Loomis' withdrawal liability should be calculated with interest accruing from December 31, 1982, the liability date. *Loomis* at 1921.

In rendering his decision, the arbitrator considered several factors. First, Tilove, a nationally recognized consultant to the Taft-Hartley industry, reviewed several illustrations included in Congressional reports of MPPAA which supported interest calculated as of the date when withdrawal liability is determined and not as of the date when payments are presumed to begin. [See H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. at 83 (House Committee on Education and Labor; H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. at 27-28 (House Committee on Ways and Means); and Joint Explanation of S. 1076, the Multiemployer Pension Plan Amendments Act of 1980, 126 Cong. Rec. at S.10119 (daily ed. July 29, 1980) (Senate

Committee on Finance and Senate Committee on Labor and Human Resources.] *Loomis* at 1920.

Second, the arbitrator considered the expert witness testimony which defined the term "amortize" to implicitly include interest. Since the liability itself was determined as of the last day of the plan year preceding the plan year in which withdrawal took place, that date, according to the expert witness, is the date upon which interest accrual should begin. Tilove reasoned that the date as of which the liability was determined should be the date accrual begins. *Loomis* at 1920.

Finally, the arbitrator noted that ERISA Section 4219 states that the assumptions for amortization of the liability "shall be based on the assumptions used for the most recent actuarial valuation for the plan" and that "the only assumption used in an amortization is interest." *Loomis* at 1921. The arbitrator went on to note that an amortization schedule is supposed to provide for the payment of the original amount through a series of installments, with interest (i.e., the time value of money) taken into account for the difference in timing. *Loomis* at 1921. The statute directs the fixing of a schedule in which the first payment is considered "as if . . . made" one year after the valuation date. The arbitrator ruled that a proper amortization schedule could not omit interest for that year. "If a bank gave a mortgage or other loan, applied the usual rate of interest, did not require first payment until a year later, and omitted any interest payment or accrual for that year, it would soon find itself in financial difficulty." *Id.* As such, Arbitrator Tilove held that it was reasonable for the Central States Plan to include pre-withdrawal interest in its amortization of the withdrawal liability, *Loomis* at 1921.

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The Fund also relies for support of its position on *Du Art Film & Technicolor and Motion Picture Local 702 Pension Fund*, 10 EBC 1326 (S.D.N.Y. 1988), where the court, in affirming the arbitrator's decision., held that MPPAA does not prohibit a multiemployer pension plan from accruing interest from one year prior to the date the employer withdraws from the plan. The court stated that the provision which deals most directly with payment of withdrawal liability, ERISA Section 4219(c)(1)(A), "neither explicitly sanctions nor bars such accrual." *Du Art* at 1328. In upholding the plan's assessment, the court reasoned that there was nothing in MPPAA nor its legislative history indicating a linkage between the date of withdrawal and accrual of interest. *Du Art* at 1328. The liability for unfunded vested benefits represents a preexisting obligation by the employer and is not simply incurred as of the date of withdrawal, Therefore, the plan's determination to accrue interest one year prior to the date of withdrawal was reasonable. *Du Art* at 1328-29.

Also, the Fund relies upon *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 12 EBC 2393 (3rd Cir. 1990), wherein the Third Circuit upheld a pension plan's imposition of pre-withdrawal interest in its amortization of withdrawal liability. The court stated that the language of Section 4219 clearly compelled the imposition of gap year interest. *Huber* at 2402-2406. As such, the plan's inclusion of pre-withdrawal interest in its amortization of withdrawal liability was reasonable. *Id.*

Finally, the Fund argues that consistent with *Huber*, the court in *Borden, Inc. v. Bakery and Confectionery Union and Industry Pension Fund*, 14 EBC 1518 (D. Md. 1991), *rev.* 974 F.2d 528 (4th Cir. 1992), included gap year interest in its

amortization of withdrawal liability. The court stated that "ERISA allows the imposition of such 'gap-year' interest because withdrawal liability is calculated based on total unfunded vested benefits at the end of the plan year preceding the year of withdrawal and the payment amortization schedule is calculated as of the first payment made on the first day of the plan year following withdrawal." As such, the presumptions mandated by ERISA Sections 4211 and 4219 for amortizing withdrawal liability require the imposition of gap year interest. *Borden* at 1528.

Applying the aforesaid to the instant case, it is clear that the Fund had a good basis to assess pre-withdrawal interest in its amortization of withdrawal liability. The cases specifically support the Fund's position, and there is nothing in ERISA nor its legislative history to preclude such an assessment. Furthermore, the statutory presumptions for calculating and amortizing withdrawal liability mandate the imposition of such interest since it is necessary to amortize the withdrawal liability from the liability date and not the presumed payment date. This mandate insures that the payment schedule actually amortizes the unfunded vested benefits allocated to Sherwin-Williams. The pre-withdrawal accrual of interest also assures a more accurate amortization of withdrawal liability and is designed to protect the financial integrity of the Fund. Thus, the Fund's determination to include pre-withdrawal interest in its amortization of withdrawal liability is reasonable.

Sherwin-Williams argues with equal eloquence and vigor, but relying on a separate litany of opinions. Sherwin-Williams relies upon *Borden, Inc. v. Bakery & Confectionery Union & Industry International Pension*, 974 F.2d 528 (4th Cir. 1992), wherein the court addressed the imposition of gap year interest

in the context of MPPAA. The plan asserted that it was entitled to assess interest on the amount of the withdrawal liability for the plan year within which the withdrawal occurred. However, the court found that MPPAA did not authorize the assessment of interest for the gap year. According to the court:

> The MPPAA is silent on the issue of imposing interest during the year in which the employer withdraws. In light of the comprehensiveness and complexity of the MPPAA, this silence is telling. When a statute prescribes amounts and computations with as much detail and thoroughness as is the case with ERISA and fails to authorize interest during a specifically authorized delay in payment, we conclude that the omission was deliberate. . . . This conclusion is buttressed by the Act's express authorization of assessing interest against an employer upon its default in making withdrawal liability payments. *See* 29 U.S.C. § 1399(c)(5). Because ERISA and MPPAA do not expressly authorize the assessment of "gap year" interest, we reverse the judgment of the District Court on this point.

Id. at 536.

Similarly, in *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 16 EBC 2841, 1993 W.L. 306856 (7th Cir. 1993), the court refused to allow the imposition of gap year interest. In reaching such a conclusion, the court stated:

> Schlitz was not liable for a penny until it withdrew from the Plan and received a notice of liability. The

> MPPAA specifically authorizes assessing the withdrawing employer with interest under several circumstances, 29 U.S.C. §1399(c)(3), (c)(4), (c)(5), but says nothing about interest prior to withdrawal. Neither the word "amortize" . . . nor any other language of the statute supports an approach that calls for pre-withdrawal interest. We join the fourth circuit in concluding that the MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises. *Borden, Inc. v. Bakery Union Pension*, 974 F.2d 528, 536 (4th Cir. 1992).

Id. at 2850.

Also, in the arbitration decision of *Carnation Co., Inc. and Central States Pension Fund*, 9 EBC 1409, Case No. 51 621 0023 84 (January 27, 1988), the arbitrator concluded that the assessment of interest during the year of the alleged withdrawal was inappropriate. In *Carnation*, the event causing Carnation's partial withdrawal from the fund occurred on December 5, 1981. In calculating Carnation's payment schedule, the fund added one year's interest — covering the period from January 1, 1981 to December 31, 1981 — in developing the payment schedule under section 4219(c)(1)(A)(i). In concluding that the assessment of this interest was inappropriate, the arbitrator stated:

> Even recognizing that "amortize" normally contemplates an imputation of interest, I am unable to agree with the Fund. . . . My difficulty is that there is nothing in the statute to suggest that the amortization period commences at the end of the

> year *prior* to the employer's withdrawal. To be sure, the employer's withdrawal liability is determined with reference to numbers calculated as of the end of the year prior to the withdrawal, but in no sense does that imply that the obligation arose as of that date or that it relates back to that date. . . . Why a contributing employer should also be required to pay interest during such period for a withdrawal liability obligation which has not yet arisen is beyond me, and I certainly find nothing in the statute that requires or supports that result. [Emphasis in original.]

Id. at 1449. The arbitrator further concluded that "the legislative history relied on by the Fund does not provide any guidance to legislative intent, on this issue," and thus he refused to find that the legislative history mandated the imposition of interest during the year of withdrawal. *Id.* at 1451.

What might be "interesting" to academicians, but what is very frustrating to named fiduciaries of collectively bargained, jointly trusteed, defined benefit pension plans subject to Title IV of ERISA, is the lack of recognition by the arbitrators and courts of "the other viewpoint." Ultimately, the U.S. Supreme Court must take jurisdiction of a gap year interest case because of the conflict in the circuit courts, or Congress must reopen MPPAA; but the issue must be resolved once and for all, to put an end to the brilliant but expensive briefing and arguing of this issue.

Until direction comes from an ultimate source, it is concluded that the rationale argued by Sherwin-Williams that pre-demand or gap year, interest *should not be included* in a

plan's calculation of employer withdrawal liability is the better position. First, the more recent decisions support this view. Second, although both positions have logical and legal merit, we are more swayed by the logic of the Seventh Circuit in *Schlitz* and the Fourth Circuit in *Borden*. Third, the United States Supreme Court has at least twice in an ERISA context held that ERISA is a complex, complete and fully integrated statute dealing with employee benefits. Thus, if it does not provide relief or a remedy for an ill, such as punitive damages or holding a party in interest who knowingly participates with a fiduciary in a breach of the latter's general fiduciary duties, then no relief or remedy exists. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985); *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 16 EBC 2169 (1993). Finally, the issue of assessment of gap year interest is not an issue on which the arbitrator must defer to the actuary, as with actuarial methods and assumptions pursuant to Section 4221(a)(3)(B). Rather, it is to be decided on the evidence presented with the Claimant having the burden by a preponderance of the evidence. Sherwin-Williams has sustained this burden. The PBGC supports this position. If Congress wants to include gap year interest in the calculation, it should say so. Arbitrators and actuaries, plan trustees and judges should not presume this inclusion in the absence of direction, any more than plan trustees or judges can presume a remedy of punitive damages or a cause of action for a party in interest's knowing participation in a fiduciary breach.

The last issue to be resolved is simply stated: Did Sherwin-Williams sell Lyons to JRC with "a principal purpose to evade or avoid" the withdrawal liability which the Fund, by letter on or about May 16, 1990, told Sherwin-Williams it would owe if Lyons effected a complete withdrawal from the Fund?

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As simple as it is to state the issue, it is that difficult to resolve it, since the decisions to date have not done the in-depth analysis of what is involved in a violation of ERISA Section 4212(c).

ERISA Section 4212(c) provides:

> (c) *if a principal purpose of any transaction is to evade or avoid liability under this part,* this part shall be applied (and liability shall be determined and collected) without regard to such transaction. [Emphasis supplied.]

The aforesaid provision came into existence in 1980 as part of MPPAA and was intended, in part, to discourage employers from withdrawing from multiemployer pension plans and leaving plans with inadequately funded liabilities. *Local 478 Trucking and Allied Industries Pension Fund v. Jayne*, 778 F.Supp. 1289 (D.N.J. 1991). The plain language of the statute expresses the intent of Congress to prohibit employers from shifting their obligations to the plan, other employers and, ultimately, those who stand to receive benefits under the plan.

The Fund cites and discusses with emphasis several of the score of reported cases under Section 4212(c). In *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F.Supp. 512 (W.D. Ill. 1988), the court, in reviewing a transaction under an analogous provision of ERISA, indicated that liability is to be imposed on an employer whenever a principal purpose of a transaction is to avoid liability.[1] In that case, the court applied a parallel

1. The single employer pension plan statute applicable to the stock sale in that case did not have an express "evade or avoid" provision, but Judge Moran found it implicit in the statute. "Evade or avoid" language that paralleled 29 U.S.C. §1392(c) was later added to the ERISA single employer plan termination rules. 29 U.S.C. §1369(a).

"evade or avoid" rule (under 29 U.S.C. Section 1362) and disregarded a parent company's transfer of a failing steel subsidiary. The court held that said transfer was to avoid liability even though the parent company may have had legitimate business concerns to transfer its subsidiary's stock. The court stated that "Congress was willing to allow a sale of the business which did not include a termination of its pension plan to end an employer's exposure to ERISA liability unless the sale was intended as a device to evade pension obligations." *Id.* at 526. The court further stated that "[s]uch intent need not, of course, be the only motive for the transaction. . . ." *Id.*

The court in *Wisconsin Steel* also explicitly held that a predecessor is exposed to liability if a principal purpose of the transaction which made him the predecessor is to evade liability. *Id.* at 526. This imposition of liability applies regardless of the economic prospects of the successor at the time of the sale and regardless of whether there were legitimate business reasons for the sale. *Id.* at 526.

The court's analysis in *Wisconsin Steel* was relied upon by Arbitrator Graham in *Banner Industries, Inc. and Central States Pension Fund*, 11 EBC 1149 (January 22, 1989) (Graham, Arb.), vacated by settlement, 12 EBC 1992 (1990). In that case, Arbitrator Graham upheld a multiemployer pension fund's $20,000,000 withdrawal liability assessment against an employer on an "evade or avoid" theory. There, Commercial Lovelace Motor Freight ("CLM"), a former subsidiary of Banner Industries, Inc. ("Banner"), had gone into bankruptcy in March of 1985 and withdrew from the Central States Pension Fund. Central States asserted a liability because two years prior to CLM filing bankruptcy Banner had sold the stock of CLM, a failing subsidiary, to an employee stock ownership plan

("ESOP"). Upon CLM filing bankruptcy, Central States asserted withdrawal liability against Banner, claiming that the stock sale was a transaction to evade or avoid withdrawal liability. The arbitrator, in reviewing all of the available evidence, held that Banner was liable to Central States because the stock sale had a principal purpose to evade and avoid withdrawal liability. *Banner* at 1181. While acknowledging the legal validity of the Sherwin-Williams argument that a vacated decision is not of any legal precedential weight, the opinion is of value in the logic applied by a respected arbitrator to the narrow body of relevant law and a comparable factual pattern.

The Fund argues that the facts in *Banner* parallel the facts in the instant case, therefore, a discussion of the *Banner* facts is appropriate. In *Banner*, the record reflects that CLM had operated profitably in the 1970s but began to experience heavy losses following deregulation. As a result of these losses, Banner sought advice from in-house personnel and consultants in an attempt to restore CLM to profitability. When these efforts proved unsuccessful, Banner considered numerous options, including the sale and liquidation of CLM. In doing so, Banner analyzed the impact of MPPAA on any transaction involving CLM. Banner continued to provide financial assistance to CLM but became increasingly concerned with CLM's effect on its profitability. In September of 1982, a consultant's report concluded that CLM would require substantial cost relief to return it to profitability. The report rejected a liquidation of CLM or an asset sale because such events would trigger withdrawal liability under MPPAA. Instead, the report recommended that an ESOP be created and funded with wage reductions.

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In March of 1993, the ESOP transaction was implemented. Banner forgave $9,700,000 owed by CLM to Banner, which was sufficient to give CLM a net worth of $1,500,000. Banner then exchanged its 100 shares in CLM for 3,990,000 new shares. Four million CLM shares were issued to the ESOP in exchange for a $750,000 loan from CLM. Banner and CLM were thus no longer in a controlled group relationship, as Banner's stock ownership fell below 80 percent. *See* 29 C.F.R. §1.414c-2(b). After the $9,700,000 of debt had been forgiven, CLM still owed Banner money. This debt was secured by CLM's assets through notes and mortgages. CLM continued to lose money, some $600,000 through the remainder of 1983 and $1,300,000 for the year ending June of 1984. Net worth declined from $2,000,000 as of June 30, 1983 to $100,000 on June 30, 1984. CLM had only $50,000 in cash as of June of 1984.

During this period, a number of measures of operating performance improved for CLM. The labor cost ratio fell from 75 percent to 65 percent, in line with that of other LTL carriers. Tonnage increased and CLM's operating ratio turned positive. Bottom-line performance improved from the prior year. Although CLM still lost money, CLM generated positive cash flow. CLM was also able to obtain substantial credit from commercial lenders.

In December of 1983, CLM began looking for a merger partner. It acquired Lee Way Motor Freight ("Lee Way") in June of 1984. After the merger, it became apparent that said merger had not worked as planned and CLM was unable to maintain Lee Way's revenues or cut costs. As such, the merged company filed bankruptcy in March of 1985, and Central States assessed a withdrawal liability against Banner.

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In the arbitration, Banner argued that its transfer of stock to the ESOP was not a transaction to evade or avoid withdrawal liability. It pointed to an opinion issued by fund counsel which concluded that the evade or avoid analysis would not apply if the transaction was justified by substantial independent economic factors. Banner then presented evidence that it had every reason to anticipate that CLM would be successful. Projections showed that CLM would have been profitable if the wage reduction program had been fully implemented. Moreover, a Big Eight accounting firm issued an opinion giving CLM a clean bill of health at the time of the sale. Banner's experts argued that CLM's cash flow could have kept it alive for years. Banner also argued that the true cause of CLM's demise was its purchase of Lee Way.

In reviewing the available evidence, the arbitrator rejected Banner's arguments and determined that the sale of CLM's stock had a principal purpose to evade or avoid withdrawal liability. *Banner* at 1181. The arbitrator stated that there was no doubt that Banner was aware of the existence of the withdrawal liability and its magnitude. The evidence demonstrated that Banner thought the stock sale would eliminate this liability. The evidence also demonstrated that CLM could have not been successful on its own given CLM's poor financial condition following the sale. The arbitrator noted that available cash eventually fell to almost zero and that CLM's loss of almost all of its equity in about two years of losses left it in an unhealthy state. The arbitrator also noted that CLM's purchase of Lee Way did not push CLM into bankruptcy.

Furthermore, the arbitrator rejected Banner's argument that there were "substantial independent economic reasons" for the stock sale. In rejecting this argument, the arbitrator held that

Banner would be liable "if one of the motivating factors was to 'evade or avoid' withdrawal liability." *Banner* at 1180. The phase "a principal purpose" must be read to indicate that if one of the motivating factors in a transaction was to "evade and avoid" withdrawal liability, that liability should be collected without regard to other motives for the transaction. *Banner* at 1180. Thus, the existence of other motives, such as the desire to eliminate CLM's losses from the books, was irrelevant. *Id.*

In rendering his opinion, Arbitrator Graham stated that great deference must be given to the court's decision in *Wisconsin Steel*. *Banner* at 1181. Liability should be imposed "whenever a principal purpose of the transaction was an attempt to avoid ERISA liability." *Id.* at 1181 (quoting Judge Moran). "If Banner were to prevail in this dispute it would sanction an interpretation of the statute which would enable an employer to rid itself of a failing subsidiary. . . ." *Id.* at 1181. Therefore, the transaction must be disregarded and liability imposed on Banner. *Id.* at 1181.

Sherwin-Williams draws support from the recent decision in *Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund*, 1992 U.S. Dist. LEXIS 12611 (N.D. Ill.) (August 20, 1992), *modified* 1992 U.S. Dist. LEXIS (N.D. Ill.) 15159 (October 6, 1992), where the court clearly rejected the argument that any consideration of potential withdrawal liability constitutes a principal purpose under ERISA Section 4212(c):

> By the same token, we do not agree with Central States' argument that it has proven that Santa Fe violated §1392(c) by showing that the company considered withdrawal liability as one of the many

> factors in deciding to sell SFTT. . . . The plain language of §1392(c) requires that evasion or avoidance must be one of the significant or central factors. Under Central States' interpretation, the mere consideration of the impact of the MPPAA would constitute a violation of §1392(c). We decline to read this provision so restrictively, with its obvious and severe ramifications for businesses contemplating any transaction involving liability under the MPPAA, without more specific direction from Congress.

1992 U.S. Dist. Lexis 1266, p. 4.

There exist other authorities considering a charge of Section 4212(c) liability. In *Flying Tiger Line v. Teamsters Pension Trust Fund of Pennsylvania*, 830 P.2d 1241 (3rd Cir. 1987), the Third Circuit discussed the "evade and avoid" provision of ERISA Section 4212(c). In the *Flying Tiger* case, Tiger International, Inc. ("Tiger") was a holding company which owned Flying Tiger Line, Inc. Tiger had purchased 100 percent of the stock in Hall's Motor Transit Company ("Hall's") and later sold that stock to Hall's Acquisition Corporation ("HAC"). HAC eventually filed for bankruptcy and was assessed MPPAA withdrawal liability by 12 of the pension plans to which it had previously contributed.

Hall's multiemployer plans asserted that Tiger was jointly and severally liable for the withdrawal liability, claiming that the transaction between Tiger and HAC was intended to evade or avoid withdrawal liability, thus violating Section 4212(c) of ERISA. *Id.* at 1244-1245. Tiger, in turn, sought a declaration in federal court that it was not liable for any withdrawal liability that might be owed to the plans by Hall's and an order enjoining the plans from asserting such claims against Tiger.

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The district court determined that "Tiger's status as an employer can be decided only by addressing the question of whether Tiger's January 1985 sale of Hall's to HAC was designed to evade or avoid withdrawal liability as defined in MPPAA section 1392(c). The district court identified a need for factual determinations to resolve the legal questions raised by Count I of the complaint, and held that those findings should be made by an arbitrator in the first instance." *Id.* at 1247 (footnotes omitted). The Third Circuit agreed. *Id.* at 1252.

In making its decision, the Third Circuit focused on the language in Section 1401 of MPPAA, which provides in part that:

> [a] dispute between an employer and the plan sponsor of a multiemployer plan *concerning a determination made under sections 1381 through 1399 of this title* shall be resolved through arbitration.

29 U.S.C. §1401(a)(1) (emphasis added). In support of its decisions, the circuit court noted that the legislative history of ERISA Section 4212(c) specifically contemplated that "disputes concerning 'evade' or 'avoid' transactions such as Tiger's 1985 sale would go through arbitration." *Id.* at 1248. The sponsor of the "evade or avoid" bill was quoted by the Third Circuit, stating that:

> transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, *the arbitrator*, and the courts follow substance rather

> than the form of such transactions in determining, assessing, and collecting withdrawal liability. [Emphasis in original.]

Id. at 1248, quoting Representative Frank Thompson, Jr. (D. N.J.), 126 Cong. Rec. H23038 (daily ed. August 25, 1980).

In *Teamsters Pension Trust Fund of Pennsylvania and Vicinity v. Central Michigan Trucking, Inc.*, 698 F.Supp. 698 (W.D. Mich. 1987), a pension plan sued a parent corporation (Fuqua) of a wholly owned subsidiary employer (Interstate) to impose withdrawal liability under MPPAA. *Id.* at 699. The district court held that "spin-off" of Interstate did not subject Fuqua to a contingent withdrawal liability that was revived and became collectible when Interstate withdrew from a multiemployer pension plan. *Id.* at 700. Further, the district court held that the question of whether the spin-off was done to evade or avoid withdrawal liability was a question for arbitration. *Id.* at 703-704.

The Michigan district court supported its decision that the spin-off of a subsidiary's shares does not trigger contingent withdrawal liability by pointing to "the plain meaning of the statute." *Id.* at 702. The court noted that a spun-off corporation is considered the "original employer" for purposes of withdrawal liability under 29 U.S.C. §1392. *Id.* "Thus, when that employer withdraws from the plan, the statute leaves no room for a previous 'employer' to step in and make up any withdrawal liability left unpaid by the spun-off company." *Id.*

The court pointed out, however, that where "spin-offs would allow companies to dump unprofitable subsidiaries and thus avoid withdrawal liability," Section 1392(c) would provide liability for such a company.

> Thus, irrespective of the "original employer" language of section 1398, if the change in business form occurred pursuant to a plan to evade or avoid liability, withdrawal liability would still be imposed pursuant to section 1392. . . . The existence of section 1392(c) obviates the need for a complex system of contingent withdrawal liability *ad infinitum* proposed by plaintiffs. Furthermore, section 1392(c) supports the conclusions that Congress did not intend such liability to exist because, in situations where such corporation changes are made in order to subvert MPPAA, the Act allowed trustees to ignore the transaction.

Id. at 702.

The district court in *Central Michigan Trucking* found that the transaction did not appear to be an evasive transaction that would be ignored under Section 1392(c). *Id.* at 703. Instead, the transaction seemed to be one supported by "genuine business reasons." *Id.* Nevertheless, the district court upheld the plaintiff's assertion that "intent to evade is a factual issue requiring evaluation of credibility and is not amenable to decision on summary judgment," and that "the statute contemplates that 'evade or avoid' issues should be brought before an arbitrator." *Id.*, citing *Flying Tiger Lines v. Central States Pension Fund*, 659 F.Supp. 13 (D.C. Del. 1986); *Banner Industries v. Central States Pension Fund*, 657 F.Supp. 875 (N.D. Ill. 1987).

In *Retirement Benefit Plan of Graphics Arts International Union Local 20-B v. Standard Bindery Company*, 654 F.Supp. 770 (E.D. Mich. 1986), the district court held that Section

1392(c) liability was triggered where the transaction in question was one whose principal purpose was to evade or avoid withdrawal liability. *Id.* at 772. The court noted that the defendants, who characterized their capital advances to the family-owned business as loans, in fact, made contributions of capital. *Id.* at 772-773. The court pointed out that "[d]efendants themselves recognized that their contributions were in actuality capital when, at dissolution of their corporation, they paid all other creditors, except the pension plan, before repaying themselves." *Id.* at 773. The latter transaction was deemed a fraudulent one by the district court; therefore, Section 1392(c) withdrawal liability was triggered. *Id.* at 773-774.

In *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Pennsylvania and Vicinity*, 787 F.2d 897 (3rd Cir. 1986), the Third Circuit addressed the question of whether under MPPAA an employer-member of an ERISA pension plan (Dorn's) may be assessed withdrawal liability when it sells all of its stock to another employer (Oneida) that assumes the operations of the corporate seller and employs most of its employees and, by virtue of its independent collective bargaining agreement with the same pension plan, continues to make payments formerly made by the first employer. The circuit court upheld the district court's finding that no withdrawal liability was incurred on behalf of the former owner-employer, since the transaction at hand was a "bona fide and arm's-length" transaction. The court noted that:

> we are not dealing with a transaction in which *both* buyer and seller conspired to reduce payments or liability to a pension plan. Rather, it [was found to be] indisputable that Oneida was unaware that Dorn's was trying to escape liability of any sort.

> Indeed when Oneida found out about Dorn's potential liability, it refused to pay Dorn's the purchase price and the parties went to arbitration. Moreover, Oneida did, in fact, offer employment to all of the former Dorn's employees and made payments on behalf of all of those employees who accepted this offer. The Plan speculates that, now that Oneida has filed a Chapter 11 bankruptcy proceeding and presumably withdrawn from the plan, the assessment of withdrawal liability against Oneida may be less than it would have been if withdrawal liability were assessed against Dorn's and Oneida separately. The truth of this proposition is far from clear and appellees' counsel suggested at oral argument that the reverse may be true. In any event, it is clear that Oneida did not intend to go into bankruptcy when it purchased Dorn's stock; thus, any gap does not result from an intentional evasion of liability.

Id. at 902. As evidenced by the last sentence, withdrawal liability is not triggered under Section 1392(c) unless there exists an intentional evasion of such liability on the part of *both parties.*

In addition to the legal arguments on the precedential cases, both parties engaged expert witnesses to make in-depth analyses of the financial conditions of Lyons at the time of the sale of Lyons to JRC. By agreement of counsel and approved by the Arbitrator, these expert witnesses were submitted in affidavit/exhibit form. First, it must be noted that the respective experts, Craig T. Elson of Peterson Consulting for the Fund, and Andrew D. Finger, C.P.A. of Cohen & Company, meet all tests and

standards of experts and may therefor offer opinion testimony. Second, the Arbitrator finds each report to be thorough, complete and highly credible, although different conclusions are reached.

Mr. Elson's affidavit is a detailed and meticulous analysis of the financial status of Lyons during the time it was a subsidiary of Sherwin-Williams, at the time of sale and thereafter. Interestingly, Mr. Elson's narration of "Lyons' Performance as a Subsidiary of Sherwin-Williams" (paragraphs 5-9, inclusive) and "The Sherwin-Williams Decision to Sell Lyons" (paragraphs 10-16, inclusive) are totally consistent with the Arbitrator's findings and statement of facts, supra.

Mr. Elson's overall opinion is stated at paragraph 27, as follows:

> 27. After conducting extensive review of all relevant information bearing on the determination of Lyons' solvency under the equitable solvency and balance sheet solvency tests, my opinion is that Lyons was both equitably and balance sheet insolvent immediately upon the June 1, 1990 transaction.

He then makes separate analyses under the Equitable Solvency Test (paragraphs 28-47, inclusive) and concludes at paragraph 48 as follows:

> 48. In the course of performing the equitable solvency analysis, we carefully considered the business events occurring after the transaction which impacted negatively on Lyons' ability to operate

> successfully. In my review, these circumstances only expedited an already (and foreseeably) untenable situation resulting from the June 1, 1990 transaction. Review of actual financial results confirms this. Over the two months immediately following the transaction, for example, Lyons lost more than $1.45 million. Lyons incurred these losses during a two month period of time when no unforeseeable significant intervening events impacted adversly [sic] on Lyons' operations. Losses of that magnitude were foreseeable at the transaction date and were factored into my assessment of Lyons' viability.

Mr. Elson then analyzes the fiscal status of Lyons under the Balance Sheet Solvency Test (paragraphs 49-66, inclusive) and concludes at paragraph 67 as follows:

> 67. In my opinion, Lyons was balance sheet solvent as of June 1, 1990, the date of the sale of Lyons by Sherwin-Williams to JRC Acquisition. Peterson Consulting considered all relevant factors bearing upon the balance sheet solvency test in a detailed and careful way. We obtained and verified Lyons' June 1, 1990 book basis balance sheet information. We adjusted those balances for minor corrections. Then we adjusted balances to reflect the accounting impact of the June 1, 1990 sale transaction of Lyons to JRC Acquisition. Finally, we converted Lyons, book-basis transaction-adjusted balance sheet from a "GAAP basis" presentation to presentation on an orderly liquidation value basis. We determined that an orderly liquidation standard of valuation was

> appropriate based upon the results of our equitable solvency test showing that Lyons was equitably insolvent at the transaction date. We have conservatively determined the magnitude of the orderly liquidation balance sheet deficit to be more than $8.3 million. Exhibit 2 is a copy of our balance sheet solvency analysis summary.

Finally, in addition to Mr. Elson's rebuttal to Mr. Finger's conclusions (paragraphs 68-73, inclusive) was the expert's critique of "the transaction":

> 62. From the purchasers (sic) perspective, Lyons was nothing more than a business gamble. The overwhelmingly likely outcome was failure. A prospective acquirer will always roll the dice, even if the chances for success are minute, if the roll is free. The amount they promise to pay if the gamble is successful is not a measure of the value of the gamble itself. The price of the Lyons gamble was zero to all JRC principals. The expected value of the Lyons gamble was not the $7.85 million offer. JRC had virtually nothing to lose, because they had no funds at risk. Similarly, Sherwin-Williams, by taking a similar interest in Lyons' assets became a general creditor. The risks of business failure were effectively being borne by Lyon's [sic] other creditors.

Mr. Finger's affidavit and attached exhibits are equally detailed, in depth and credible. His conclusion, as set forth at paragraph 5 of his affidavit, is as follows:

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> 5. It is my opinion based upon documents reviewed and other information provided to me, that Lyons was solvent at the date of sale from The Sherwin-Williams Company to J.R.C. Acquisition Corp.

While the solvency or general fiscal status of Lyons at June 1, 1990 is highly relevant, it is not determinative. The issue presented for resolution is whether Sherwin-Williams sold Lyons to JRC with a principal purpose to evade or avoid the withdrawal liability under the Fund if Lyons were to make a complete or partial withdrawal from the Fund.

Solvency obviously bears on this issue. If Lyons had been a "healthy and viable corporate entity" at the date of the transaction, with an indisputable net worth in eight or nine figures, a subsequent bankruptcy filing and cessation of contributions probably would not have precipitated a trustees' finding of an alleged violation of ERISA Section 4212(c). The less "healthy and viable the corporate entity" at the sale date, the more likely, on a circumstantial basis, that ERISA Section 4212(c) motivations were involved. However, whether Lyons was solvent or insolvent, on an equitable solvency or balance sheet solvency basis, on an ongoing business or a termination basis is not, per se, determinative.

There really is little or no disagreement on the facts. The purchase of Lyons in January of 1987 by Sherwin-Williams and its subsequent operation for three and one-half years was a fiscal fiasco. Essentially, every month during this period of Sherwin-Williams' ownership, Lyons experienced a cash flow loss spanning a gamut of $300,000 to $775,000 a month. Overall, Sherwin-Williams underwrote over $18,000,000 in

monthly cash flow shortfalls. The several business objectives were never obtained. In addition, and beyond Sherwin-Williams' knowledge in January of 1987 or control thereafter, the industry turned against it and its business plan and objectives. Given the business acumen of a Fortune 200 company, Sherwin-Williams reviewed the situation and, in mid-to-late 1989, made a business decision to pull the plug on Lyons, to cut its losses, and to remove itself from the LTL trucking business to support this division of its overall operations. There is no evidence sufficient to support an affirmative intent to violate ERISA Section 4212(c) at this point in time.

Initially, Sherwin-Williams had three alternatives given the fiscal picture of Lyons from January of 1987 through September of 1989, a 33-month period;

1. continue to operate the business using any and all methods and techniques available to it to reduce losses and obtain profitability;

2. close down the business;

3. sell the business; in either an asset or a stock transaction.

In fact, there is ample evidence in the record that Sherwin-Williams made a due diligence inquiry into all of these business alternatives. A close-the-doors decision had the salubrious effect of stopping the cash flow bleeding. No longer would Sherwin-Williams be called upon to make monthly advances of cash to keep Lyons operational. Of course, as counsel for the Fund accurately points out, an immediate result

of the implementation of this business strategy would have been to effect a complete withdrawal from the Fund [ERISA Section 4203(a), a complete withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan] and thereby trigger a withdrawal liability assessment [ERISA Section 4201(a), if an employer makes a complete withdrawal from a plan, then the employer is liable to the plan in the amount determined to be the withdrawal liability].

There is no evidence, other than circumstantial logic, that Sherwin-Williams got that far before rejecting the "lock-the-doors" alternative. Under a close-up-business plan, the employer does not per se terminate its cash outflow. Lyons owned assets — real estate with buildings and improvements thereon, rolling stock, accounts receivable, etc. Even if Sherwin-Williams locked the doors of Lyons, the assets had to be kept insured, taxes had to be paid, and some minimal level of maintenance maintained. Further, a lock-the-door strategy provides no basis to recover any of the $14,000,000 it paid for Lyons nor the $18,000,000 it underwrote. Under the opinions of either or both experts, Lyons' assets at June 1, 1990 were $15,600,000 to $20,600,000. Even a Fortune 200 company does not walk away from assets in that amount. Clearly, a lock-the-doors strategy creates the worst possible context to try to sell at fair value, market value or equivalent the $6,000,000 to $10,000,000 in land and improvements.

A second alternative available to Sherwin-Williams was an orderly liquidation of the assets of Lyons. Mr. Kinney readily admitted that he considered this alternative but summarily rejected it based on the state of the trucking industry in 1989-1990. That is, the eruption in the industry caused a number

of carriers to go bankrupt, that truck terminals, rolling stocks and miscellaneous trucking industry equipment were a glut on the market, and selling prices within the range of cost, market or depreciated value were unattainable. This approach would have had the advantage of stopping the bleeding, subject to ongoing costs to insure and maintain properties until a semi-distress value sale could be effected. The Fund is quick to note that an orderly liquidation was not an appropriate alternative vis-a-vis the issue of withdrawal liability, since the cessation of business activities would have triggered a complete withdrawal and the assessment of a withdrawal liability award (p. 47, supra).

A third alternative was to sell Lyons. This could have been done on either an asset sale or a sale of the common stock of the company. Again, Sherwin-Williams readily admits these alternatives were considered. Mr. Kinney allowed that a sale-of-assets transaction was not desirable from Sherwin-Williams standpoint since the decline in the trucking industry and the bankruptcy of many of the less-well-capitalized entities produced a glut of terminals, rolling stock and miscellaneous properties, making it impractical to obtain fair value for the assets offered for sale. The Fund counters that it was not the glut of assets and the resulting depression of the market price that rendered this alternative not viable, but that under ERISA Section 4204(a)(1)(c) the seller remains contingently liable for the withdrawal liability that would have been assessed on the sale but for compliance with this section. In the context of this theory, the Fund and its expert's opinion of the insolvent condition of Lyons at June 1, 1990 become highly relevant. If Lyons were insolvent at the time of the transaction with JRC, then under ERISA Section 4204, Sherwin-Williams would become liable for the withdrawal liability assessment as much

as if Sherwin-Williams had elected either to shut the doors of Lyons or do an orderly shutdown and liquidation of assets.

Finally, the claimant had the option of a sale of the stock of Lyons, the form of transaction actually implemented. It had the obvious advantages of accomplishing all of Sherwin-Williams' aims; it stopped the bleeding instantly; it got a fair price (based on the contract price stipulated in the definitive Agreement for Purchase and Sale); it got Sherwin-Williams out of the crumbling LTL business; and incidentally rid Sherwin-Williams of the withdrawal liability to the Fund and the other two Teamsters Taft-Hartley plans to which it contributed. While the Trustees of the Fund and their counsel agree with stopping the bleeding and getting out of the industry, it argues that the seller did not shuck its liability under ERISA Section 4201(a), since Sherwin-Williams' intent in implementing this transaction was to evade or avoid the Section 4201(a) liability, in violation of ERISA Section 4212(c).

The Fund's argument is not without great logic. Although there were a number of potential suitors for Lyons (pp. 4-7, supra), JRC was the only one pursued — since it was always cast as a cash-for-stock swap, a nontrigger form of transaction for ERISA Section 4201 (a), et al. Even when JRC changed the transaction from a cash-at-closing to a highly-leveraged-buyout, Sherwin-Williams stuck with JRC and failed to go back to any other interested parties.

Whether Lyons was insolvent on June 1, 1990 or merely on its financial deathbed is irrelevant. No one can deny it was fiscally moribund. Sherwin-Williams knew that without a deep pocket to subvend its monthly losses, Lyons could not survive. If JRC had a business plan (a panacea for financial success for

an LTL in upstate New York in 1990), could not the talent at Sherwin-Williams and/or available to it have arrived at the same or a similar business plan, a similar panacea? Why would Sherwin-Williams believe that JRC could do an instant turnaround of Lyons when its study forecast a minimum of three years to got into the black?

The Fund has an answer. The Fund suggests that the total consideration of the transactions was approximately $14,850,000, not $7,850,000 as stipulated in the Agreement. Of this, Sherwin-Williams "received" at closing $1,600,000 cash (albeit its own money) and "relief" from approximately $7,000,000 of employer withdrawal liability assessments. If it received the remaining $6,200,000 of the contract purchase price, it had narrowed its overall losses significantly; but even without the time payments, it received instant cash and debt reduction equal to the amount for which it was willing to sell Lyons, what others were willing to pay for Lyons.

The essential inquiry is what the words "a principal purpose" mean in the context of Section 4212(c). The Fund admits that it has "no smoking gun." It argues that a total view of all of the facts dictates a conclusion that Sherwin-Williams had as "a principal purpose" the evasion or avoidance of withdrawal liability. Sherwin-Williams, with reluctance, admits that it knew a potential employer withdrawal liability existed but that it sold Lyons to stop the monthly cash flow bleeding, as a result of the abandonment of its prior business plan. These arguments, like the cases cited, beg the question: What do the words "a principal purpose" mean?

The first word, "a," is important. Assuming the classic rule of interpretation of federal legislation — Congress is composed

of reasonable persons acting in a reasonable manner — the word "a" means that the party(ies) may have more than one "principal purpose." If there is only one principal purpose, Congress would have used the word "the" in connection with "principal purpose." Thus, conclusion number one — there may be two or more principal purposes in a transaction within Section 4212(c).

What do the words "principal" and "purpose" and together "principal purpose" mean? Interestingly, there are several cases which touch the issue of the meaning of the phrase "principal purpose."

The issue of whether "a principal purpose of a transaction was to avoid or evade federal income tax" was considered in depth in the case of *Supreme Investment Corporation v. United States of America*, 320 F.Supp. 1328 (D.C. La. 1970). This was an action for refund of federal income taxes paid. The district court held that in light of the father-son and attorney-client relationships of persons involved in a liquidation transaction by which a corporation acquired a promissory note payable to the order of the liquidated corporation and the lack of compelling evidence as to the real business purposes for the transaction, the primary purpose of the transaction was the evasion or avoidance of taxes; and, therefore, a stepped-up basis for the installment obligation could properly be denied on the transfer of the note pursuant to the provisions of the Internal Revenue Code which provided that if any person acquires control of a corporation and the principal purpose of the acquisition is evasion or avoidance of federal income tax, the benefit or allowance may be disallowed.

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The court, after acknowledging that the determining question before it is "whether the parties involved in the transaction here had as their principal purpose the avoidance or evasion of federal income tax" [320 F.Supp. at 1332], noted, "The principal purpose is that purpose which exceeds all others in importance." The court cited *Green Light Co. v. United States*, 405 F.2d 1068, 1070 (5th Cir. 1968), as its authority therefor.

Another relevant decision on the issue of intent to evade or avoid taxes is *Bobsee Corporation, et al. v. United States of America*, 411 F.2d 231 (5th Cir. 1969). This was an action by four corporate entities for refund of allegedly excessive income taxes paid for certain fiscal years. The District Court for the Middle District of Florida entered judgment for the government, and the four taxpayer corporations appealed. The Court of Appeals held that whether owners of orange groves incorporated each of the groves separately had as its principal purpose tax avoidance, to obtain additional surtax exemptions, was a question for the jury and therefore affirmed the trial court decision.

The issue presented dealt with the provisions of Section 269 of the Internal Revenue Code of 1954, which provided, in part, that if any person acquired control of a corporation and the principal purpose for such acquisition was evasion or avoidance of federal income tax by securing the benefit of a deduction, credit or other allowance which such person would otherwise not enjoy, then such deduction, credit or other allowance shall not be allowed. In describing its role, the court noted:

> Theoretically the question of purpose is purely subjective; pragmatically, however, the trier of fact can only determine purpose from objective facts.

411 F.2d at 238. The court noted:

> This court has held that the *principal purpose* is the purpose which exceeds all other purposes in importance.

411 F.2d at 238, relying upon *Green Light Co. v. United States*, supra. In discussing the court's ruling in *Green Light*, it noted differences of opinion in the legislative history of Internal Revenue Code Section 269 in the House and Senate. The court reconciled the difference, in its *Green Light* decision, and noted this reconciliation as follows:

> Consequently, our *Green Light* decision heated the policy and the actual language of the section rather than the abortive attempt at definition in the Senate committee report. As we view the operation of the statute, there are only two relevant classes of purposes: tax-avoidance and non-tax-avoidance; the statute applies only if the former class exceeds the latter class.

411 F.2d at 239.

The "principal purpose" requirement of the Federal Regulation of Lobbying Act was adopted merely to exclude from its scope those contributions and persons having only an incidental purpose of influencing legislation and, conversely, the requirement excludes neither a contribution which in

substantial part is to be used to influence legislation through direct communication with Congress nor a person whose activities in substantial part are directed to influencing legislation through direct communication with Congress. *United States of America v. Harriss*, App. D.C., 74 S.Ct. 808, 347 U.S. 612, 98 L.Ed. 989.

For purposes of the Bankruptcy Code, 11 U.S.C.A. Section 1129(d), which precludes a court from confirming a plan if the principal purpose of the plan is avoidance of taxes, "principal purpose" means most important. *In re Rath Packing Co.*, 55 B.R. 528 (Bkrtcy. Iowa).

In determining whether the "principal purpose" for acquiring control of a corporation was a tax or nontax purpose, for purposes of the statute providing for disallowance of tax avoidance benefits if the principal purpose for acquiring control of the corporation is income tax evasion, tax avoidance purposes should be compared to aggregated legitimate nontax avoidance business purposes. *U.S. Shelter-Corp. v. United States of America*, 13 Cl.Ct. 606.

In West's *Legal Thesaurus/Dictionary*, William P. Statsky, West Publishing Co., 1986, the words are reported separately as follows:

> Principal . . . 5. *adj.* Greatest or foremost in importance or rank (principal means of support). Chief, major, primary, supreme, highest, prime, strongest, paramount, leading, first, prominent, central, cardinal, capital, pre-eminent, sovereign, crowning, uppermost, controlling, managing, governing, determining, predominating, pre-

dominant, fundamental, essential, key, matchless, superior, outstanding, basic.

Purpose, *n.* 1. That which one seeks to accomplish (legislative purpose). Plan, aim, intent, end, object, project, design, ambition, target, rationale motivation, resolve, wish, reason, proposal, scheme, rationalization, vision, desideratum, view, guiding principle, outcome, basis, destination, explanation, objective, raison d' être, aspiration. 2. Resolve (want of purpose). Determination, persistence, will, perseverance, tenacity, steadfastness, constancy, zeal, volition, industry.

In Holas & Haley, *Black's Law Directory*, 6th Ed., West Publishing Co., 1990, the words are defined as follows:

Principal, *adj.*, Chief; leading; most important or considerable; primary, original. Highest in rank, authority, character, importance, or degree.

Purpose. That which one sets before him to accomplish or attain; an end, intention, or aim, object, plan, project. Term is synonymous with ends sought, an object to be attained, an intention, etc. *Andresen v. Board of Sup'rs of Santa Cruz County*, 235 C.A.2d 436, 45 Cal.Rptr. 306, 309.

In Urdang & LaRoche, *The Synonym Finder*, Rodale Press, 1978, the words are reported as follows:

principal, adj. 1. chief, prime, paramount; most important, first, highest, leading; main, major,

cardinal, supreme; superlative, best, crowning, acmic, acmatic, summital; greatest, maximal, nonpareil, unparalleled, matchless, peerless; utmost, uppermost, super-eminent, preminent; star, sovereign, ruling; prevailing, hegemonic, dominant, predominant; ranking, leading, foremost; definitive, conclusive, determinative; key, vital, crucial, central, essential; strongest, most effective, ultimate.

purpose, *n.* 1. reason, point, why, why and wherefore; principle, guiding principle, basis, root; idea, plan, design, proposal, scheme; motive, motivation, mainspring, driving force, cause; rationale, explanation, background, meaning; rationalization, justification, excuse, mitigation, vindication.

Attempting to pull all of these diverse authorities together, it appears that the phrase "a principal purpose" in Section 4212(c) means:

(a) one of two or more;

(b) important, integral, essential, significant, prime, predominant, central, vital, crucial, or key;

(c) aims, ends, goals, objectives, reasons, basis or rationales.

As the Fund notes in its Post-Hearing Brief, Congress created a strong burden for parent corporations seeking to shed subsidiary entities with potential withdrawal liability assessment when it made the test a principal purpose "to evade

or avoid liability." As a general proposition, client tax planning is based upon determining, implementing and maximizing legal techniques of tax "avoidance," while acknowledging that tax "evasion" is illegal and improper. Thus, in many situations, the issue is "tax avoidance," which is legal and proper, or "tax evasion," which is illegal and improper. When Congress, in the enactment of ERISA Section 4212(c), proscribed that transactions with a principal purpose "to evade *or* avoid liability" withdrawal liability shall be assessed without regard to such transaction, it significantly increased the burden of a seller to sell off an operating unit that possessed a potential withdrawal liability to avoid inclusion within the ambit of Section 4212(c).

Using the approach of an analysis of the operative words of the statute [Section 4212(c), "if a principal purpose of any transaction is to evade or avoid liability under this part. . . ."], certain of the authorities relied on by one of the parties are seen in a new light. For example, *Dorn* (p. 41, supra) is cited by Sherwin-Williams as requiring that *both parties to the transaction, the buyer as well as the seller*, must have the threshold intent to evade or avoid withdrawal liability by the transaction to invoke Section 4212(c). *This conclusion is rejected.* The removal of the liability is a seller's concern, but often a buyer takes little or no issue with the fact of this contingent obligation. To require both parties to the transaction to have an affirmative intent would emasculate the Congressional intent behind Section 4212(c). Hence, the absence of any evidence that JRC implemented the sale for this purpose is irrelevant as to whether Sherwin-Williams sold Lyons to evade or avoid the withdrawal liability assessment from the Fund.

Conversely, the Fund's interpretation of *Banner* (pp. 31, et seq., supra) is equally overreaching. According to the Fund, *Banner* stands for the proposition that if any one of a multitude of factors for a transaction was to rid itself of potential withdrawal liability, the transaction falls within the ambit of Section 4212(c). It is evident indeed that the Sherwin-Williams and JRC executives were aware of the Lyons' contingent employer withdrawal liability to the three plans. They also *knew* the range of the liability was up to $7,000,000.

However, to read and apply *Banner* in the manner Fund counsel urges would mean that a parent corporation could *never* sell a subsidiary which participated in a defined benefit, multiemployer, employee pension benefit plan which had unfunded vested benefits, without incurring the contingent liability, since prudent executives must know these facts before they make such decisions; it would always be "a factor in the decision-making process." Although Congress clearly intended to protect such plans and, most importantly, their participants from actions of deliberate evasion or avoidance, it is my view that Congress did not create a statutory standard that would effectively render it impossible for firms to sell troubled assets in an effort to alleviate losses. Management has a duty to protect shareholders, which must also be balanced in this analysis. The Fund must show something more than mere knowledge of the potential liability in order to establish that such knowledge was a principal purpose.

The position of the court in *Santa Fe Pacific Corporation* is clearly more logical and more in keeping with the presumption that reasonable solons were acting reasonably in enacting Section 4212(c). To make a mere consideration of the fact of MPPAA withdrawal liability is without reason. It may

be considered — and if the truth be known, is always known and considered (or, at least, should always be known and considered) — by competent corporate executives and benefits counsel. Mere consideration is not a principal purpose, per se.

This Arbitrator must weigh the Fund's arguments of inference against the required proof that Sherwin-Williams/JRC had as a proven purpose shedding the employer withdrawal liability, not only to the Fund but also to the Western Pennsylvania plan and the Central States plan. It is concluded that Sherwin-Williams had a principal purpose for its sale to JRC the evasion or avoidance of employer withdrawal liability — as that phrase is construed and applied. If the statutory term had been "*the* principal purpose," a contrary result would obtain, since the Arbitrator firmly believes, based upon the testimonial and documentary evidence introduced, that Sherwin-Williams' number one, first reason for the sale was to stop the monthly losses of up to $500,000 per month. Actually, at this rate, Sherwin-Williams would have expended $7,000,000 in 14 months, less than half the time its study showed it would take to turn Lyons around. Sherwin-Williams wanted to sell Lyons because its prior strategies had proven to be unworkable. It had a purpose to sell Lyons to get out of the LTL business, given the dramatic changes in the trucking industry. In addition, and notwithstanding the aggressive protestations of the Sherwin-Williams witnesses and counsel, Sherwin-Williams *knew*:

> (a) that Lyons participated in three multiemployer, defined benefit, employee pension benefit plans subject to Title IV of ERISA;

(b) that if Lyons effected a complete withdrawal from said plans the withdrawal would trigger the withdrawal liability;

(c) that the liability to all three plans in the aggregate could reach $7,000,000; and

(d) that a sale of stock would, on its face, allow Sherwin-Williams to rid itself of Lyons and the monthly subventions without triggering the liability under Title IV.

As noted above, Congress could not have intended ERISA Section 4212(c) to prohibit all transactions involving subsidiary entities which participate in defined benefit plans that have unfunded vested benefits. However, in view of what Sherwin-Williams "knew," as enumerated above, and in view of the additional facts that Sherwin-Williams also knew:

(a) that Lyons could not survive without someone underwriting its monthly losses;

(b) that although Lyons may have been "solvent," it clearly was not an economically viable operating entity in mid-1990;

(c) that JRC was a shell corporation, also without economic viability;

(d) that once the transaction was recast from $7,850,000 cash at closing to $1,600,000 down and the balance over six years and secured by Lyons' assets, in view of the problems in the industry, the

monthly losses of Lyons as an operating entity and the shell nature of JRC, it was unlikely that Sherwin-Williams would ever receive more than $1,600,000 or so *cash* for Lyons; and

(e) that $1,600,000 cash plus avoidance of $7,000,000 of contingent employer withdrawal liability made $8,600,000, the consideration Sherwin-Williams deemed a fair price for Lyons. (If there was a miracle on Lake Erie and Sherwin-Williams received the $7,850,000 plus the employer withdrawal liability relief of $7,000,000, it got all its money back — unlikely as that seemed.);

it is concluded that under all of the facts, Sherwin-Williams did have as *a principal purpose* in the transaction, i.e.,

(a) one of two or more,

(b) important, integral, essential, significant, prime, predominant, central, vital, crucial or key,

(c) aims, ends, goals, objectives, reasons, bases or rationales,

the evasion or avoidance of the employer withdrawal liability from the Fund.

There were other purposes also, but evasion or avoidance was one of the primary purposes. There were sound business purposes as well; but once you consider the five factors enumerated at pages 61-62, supra, and once you realize that Sherwin-Williams is a Fortune 200 company, with

knowledgeable experts and personnel and a $7,000,000 issue, you know it was a factor and, in the overall context, "a principal purpose" to be rid of the Title IV liability.

The Fund is therefore ordered to return to Sherwin-Williams the principal amount of the gap year interest actually paid, $35,795, plus interest thereon calculated at the rate and in the manner the Fund calculated the withdrawal liability assessment on or about December 11, 1990 from the date the Claimant made its payment to the Fund until the Claimant is in collected funds from the Fund. Each side shall bear its own legal expenses.

s/ Marc Gertner
Marc Gertner, Arbitrator

February 7, 1994

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE DATED AND FILED DECEMBER 27, 1995

The TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Teamsters Pension Trust Fund of Philadelphia and Vicinity, and Charles J. Schaffer, Jr., its administrator and fiduciary, Plaintiffs,

v.

FEDERAL EXPRESS CORPORATION, The Flying Tiger Lines, Inc., Warren Transport, Inc., and Tiger International, Inc., Defendants,

and

FEDERAL EXPRESS CORPORATION, The Flying Tiger Line, Inc., Warren Transport, Inc., and Tiger International, Inc., Plaintiffs,

v.

The TRUSTEES OF TEAMSTERS PENSION TRUST FUND OF PHILADELPHIA AND VICINITY,

Teamsters Pension Trust Fund of Philadelphia and Vicinity, and Charles J.

Schaffer, Jr., its administrator, Defendants.

Civ.A. Nos. 86-304, 94-017, 94-033, 94-112 and 94-130.

Appendix E

United States District Court, D. Delaware.

Dec. 27, 1995.

* * *

MEMORANDUM OPINION

SUE L. ROBINSON, District Judge.

I. INTRODUCTION

This litigation is the latest chapter in a case that has lingered for nearly ten years. The dispute arose from the bankruptcy of Hall's Motor Transit Company, Inc. ("Hall's") in March 1986, and the company's resulting withdrawal from the Teamsters Pension Trust Fund of Philadelphia and Vicinity ("the Philadelphia Fund"). Between 1980 and 1985, Hall's was a fully owned subsidiary of Tiger International, Inc. ("Tiger"). In January 1985, Tiger sold 75% of Hall's shares to a management buyout group, Hall's Acquisition Corporation ("HAC"), and later transferred its remaining 25% interest as well. After Hall's declared bankruptcy in 1986, the trustees of several pension plans to which Hall's had been contributing assessed withdrawal liability against Tiger. In response, Tiger filed suit seeking a declaration that it was not responsible for Hall's withdrawal liability. Tiger eventually settled with all of the funds except the Philadelphia Fund, and the remaining dispute was ordered into arbitration by the Third Circuit. Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity, 830 F.2d 1241 (3d Cir. 1987).

The Philadelphia Fund now brings this suit pursuant to 29 U.S.C. § 1401(b)(2) to vacate the arbitrator's decision finding no withdrawal liability on the part of Tiger. Tiger has moved to enforce the arbitrator's award. Because the court finds no clear error in the arbitrator's conclusions of fact and no error of law, Tiger's motion to enforce the award will be granted, and the Philadelphia Fund's motion to vacate will be denied.

II. BACKGROUND

The facts as set out in the Arbitrator's Findings, Opinion and Award (D.I. 254 at 6131 et seq.) are as follows:[1]

Tiger was a transportation services holding company whose subsidiaries included Flying Tiger Lines, Inc. ("Flying Tiger"), a cargo airline; North American Car Corporation ("North American"), a rail car leasing company; Tiger Air, Inc. ("Tiger Air"), which sold and leased aircraft and provided aviation services; and several other companies in the fields of computer and equipment leasing, aircraft charter and leasing, and mortgage insurance. Between 1979 and 1981, Tiger acquired three trucking companies, including Hall's. (D.I. 254 at 6140-41)

During the first year of Tiger's ownership, Hall's reported net gains and was a substantial cash source for Tiger. Beginning in 1981, however, Hall's began to feel the effects of the recession, deregulation, and other changes in the trucking industry. (D.I. 254 at 6142) At the same time, Tiger and its other subsidiaries were also facing a fiscal crisis. In February 1983, Flying Tiger, North American, and other Tiger

1. Although the parties disagree on the inferences to be drawn from the facts, the basic sequence of events is undisputed.

subsidiaries declared a moratorium on debt payments and invited their lenders to restructure their outstanding loans. (D.I. 254 at 6143)

The resulting agreements led to the gradual dismantling of Tiger Air and North American, and strict limitations on the amounts and purposes of cash advances from the subsidiaries to Tiger. These conditions limited Tiger's overall cash flow and prevented Tiger from channeling funds from a healthy subsidiary to a troubled one, such as Hall's. (D.I. 254 at 6144-46) The restructuring also produced the "Override Agreement," which set out the events that would cause immediate default on Flying Tiger's loans. One of the events that would trigger default was "Aggregate Plan Liability" in excess of $5 million. Aggregate liability was to be determined by adding a) unpaid liability resulting from the termination of any single employer pension plan by Tiger or any of its subsidiaries; b) withdrawal liability assessed by the trustees of any multiemployer pension plan against a Tiger-affiliated company; and c) unpaid delinquent pension contributions owed by any Tiger-affiliated company. (Override Agreement, D.I. 262 at 68-384, Supplemental Joint Appendix)

Meanwhile, the financial situation at Hall's worsened. The company had reported operating losses for three years in a row and its net worth was steadily declining. Hall's auditors gave qualified opinions in 1982 and 1983, based substantially on the poor financial health of its parent company, Tiger. (D.I. 254 at 6146) James Cronin, who had participated in management and planning at other Tiger subsidiaries, was asked to evaluate Hall's in early 1984. By mid-year he was appointed Hall's president. Cronin believed that Hall's could be turned around, but only if the company could negotiate wage concessions in exchange for an Employee Stock Option Plan ("ESOP").

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By the end of 1984, it was clear that Hall's would need an infusion of capital to survive. The company was already carrying approximately $12 million in debt, secured by liens on its rolling stock, and the existing lenders appeared unwilling to lend any more. (D.I. 254 at 6143) Tiger's own poor financial condition and the restrictions imposed upon it by the restructuring agreements limited its ability to contribute the needed capital. Labor costs were soaring, but Hall's had not yet been able to secure a wage cut in return for the implementation of an ESOP. Cronin and others in the organization believed that Tiger's ownership of Hall's played a significant role in the union's refusal to accept wage concessions. Cronin also discovered that Hall's competitors were using Tiger's well-publicized financial troubles to lure away customers concerned about having their goods abandoned or tied up in bankruptcy proceedings. (D.I. 254 at 6149)

In November 1984, Cronin engaged Alex, Brown & Sons to find a purchaser for Hall's. (D.I. 254 at 6150) Several prospective buyers responded to the selling memorandum, and on December 12, 1984, Tiger representatives met with one of the respondents, Whit Lee. Lee offered $10 to $15 million for Hall's stock, and proposed that Hall's $12 million intercompany debt to Tiger be forgiven. After learning that Tiger wished to close the transaction before December 31, 1984, Lee revised his proposal. He offered only $1,000 in cash, but would leave $10.5 million of the intercompany debt in place. Alvin Bodford, Hall's chief financial officer, then proposed a management buyout of the company on the same terms that Lee had offered. Hall's lenders preferred Bodford to Lee as a purchaser, so Tiger discontinued negotiations with the latter. (D.I. 254 at 6150-55)

According to the terms of the resulting agreement, which Tiger's board approved on December 31, 1984, Tiger sold 75%

of Hall's shares to HAC, which Bodford had formed for the purpose of the sale. Tiger retained the remaining 25% of Hall's stock and reserved the right to name a director to Hall's board.[2] Tiger also paid the closing costs, which amounted to approximately $1 million. In return, HAC paid $1,000 in cash and gave Tiger a note for $10.5 million, secured by Hall's real estate but junior to the secured rights of Hall's outside lenders. The agreement required HAC to continue contributions to the pension plans at the pre-sale level. Hall's lenders also participated in the agreement, promising $5 million in new capital in exchange for first liens on all unencumbered real estate and rolling stock. (D.I. 254 at 6156-57)

Under HAC's ownership, Hall's downward spiral accelerated. Within a few months of the sale, a substantial part of the management team and the turnaround specialist hired at the lenders' urging had departed, citing "differences in management philosophies." (D.I. 254 at 6161) Hall's operating revenues dropped from $190 million to $160 million, and its market share declined 25% over the course of 1985. (D.I. 254 at 6161)

In November 1985, Bodford approached Tiger and demanded that Tiger relinquish both its remaining 25% interest in Hall's and its $10.5 million note. Tiger initially refused. Bodford then threatened to redeem HAC's 75% stake in Hall's. He pointed out that by doing so he would force Tiger to resume full ownership of Hall's, and full liability for pension fund withdrawal if Hall's should fail. (D.I. 254 at 6162) Realizing that Hall's demise was at that point likely, Tiger acceded to Bodford's demands. (D.I. 254 at 6162)

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2. Tiger never exercised this right.

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Hall's filed for bankruptcy under Chapter 11 on March 10, 1986. By the end of 1987, it had ceased all contributions to the pension funds to which it had assumed obligations. (D.I. 254 at 6163)

III. DISCUSSION

A. Standard of Review

In reviewing the findings of fact of an arbitrator in the context at bar, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). The "clear preponderance" language of the statute has been used interchangeably with "clear error." See, e.g., Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir.), cert. denied, 115 S. Ct. 483 (1994). "A finding is clearly erroneous if the reviewing court, after duly acknowledging the superior proximity of the factfinder to the witnesses, is firmly convinced that the finding is erroneous." Santa Fe, 22 F.3d at 727, citing Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2279-80 (1993). The arbitrator's legal conclusions are reviewed de novo. Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund, 982 F.2d 857, 860 (3d Cir. 1992), cert. denied, 113 S. Ct. 2961 (1993).

B. Evade or Avoid Liability

The arbitrator found that Tiger is not liable for the unfunded vested pension obligations of Hall's because evading such liability was not a principal purpose of the sale of Hall's. The Philadelphia Fund raises three challenges to the arbitrator's

conclusions on this issue. First, the Fund contends that the arbitrator erred as a matter of law by not applying the correct presumptions to the determination of the plan sponsor. Second, the arbitrator erred as a matter of law by focusing on whether Tiger had any other plausible reasons for selling Hall's, rather than on whether avoiding withdrawal liability was a principal purpose of the transaction. Finally, the Fund argues that the arbitrator's factual conclusions are clearly erroneous.

1. The Statutory Scheme

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which amended the Employee Retirement Income Security Act ("ERISA"), participating employers contribute to a common fund for employee pensions. Each employer contributes in amounts determined through the collective bargaining process. The pension plan is administered by trustees, half of whom are selected by the employers and half selected by the union. To protect the other employers as well as the pensions themselves, the MPPAA imposes liability for unfunded benefits on an employer who withdraws from a plan. The statute defines withdrawal as occurring "when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1381. The MPPAA provides several exceptions to the imposition of liability upon withdrawal from a plan, including § 1398, which provides that liability shall not be imposed in the case of a mere change in corporate structure which does not interrupt the employer's contributions.

The MPPAA also sets out a crucial exception to the exceptions, providing that "[i]f a principal purpose of any

transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction." 29 U.S.C. § 1392(c). Therefore, if the sale of Hall's was undertaken principally to avoid MPPAA liability, withdrawal liability would properly be assessed against Tiger as if it had never sold Hall's to the Bodford management group.

2. Deference to the Plan Sponsor's Conclusions

ERISA requires arbitrators to accord deference to the factual determinations and accounting assumptions of the plan sponsor. 29 U.S.C. § 1401(a)(3). This section states that an arbitrator shall presume correct any determination made by a plan sponsor "unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous." As interpreted by the Supreme Court in Concrete Pipe, this section "plac[es] the burden of persuasion as to historical fact on the employer." Concrete Pipe, 113 S. Ct. at 2282. The employer has the burden of disproving the plan sponsor's conclusions by a preponderance of evidence. Id. at 2283.

The Philadelphia Fund contends that the arbitrator erred as a matter of law in deciding that evading withdrawal liability was not a primary purpose of the sale of Hall's. It is a question of law, the Fund maintains, because the arbitrator failed to apply the presumption of correctness required by 29 U.S.C. § 1401(a)(3). To support this claim, however, the Fund simply argues its version of the facts. The essence of this argument is that the arbitrator must have applied the wrong standard because he reached the "wrong" conclusion. This court finds that the arbitrator did correctly articulate the presumption and burden

of proof, and there is no indication that he did not fully understand and apply them in this case. Therefore, the court concludes that the arbitrator did not err as a matter of law by failing to apply, or by incorrectly applying, the presumption of correctness required by § 1401(a)(3).

3. The Statutory Standard

The Philadelphia Fund contends that the arbitrator erred as a matter of law by incorrectly interpreting § 1392(c). This section provides that where a primary purpose of a transaction is evasion or avoidance of withdrawal liability, that transaction shall be disregarded when assessing such liability. According to the Philadelphia Fund, the arbitrator considered only whether Tiger had any legitimate reasons to sell Hall's. This analysis was erroneous, the Fund maintains, because the statute requires only that evasion be a primary purpose for the transaction, not the primary purpose.

In deciding this issue, the arbitrator correctly relied on Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity, 787 F.2d 897 (3d Cir. 1986).[3] The facts of Dorn's are similar to the present case. In Dorn's, a trucking business was sold to a company that had identical collective bargaining agreements with the union pension plan. The buyer company continued contributions until it went

3. The arbitrator also noted that this provision has not been widely applied, and has usually been construed narrowly. See, e.g., Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), cert. denied, 485 U.S. 1008 (1988) (an employer's attempt to minimize the amount of withdrawal liability did not constitute an attempt to evade or avoid under § 1392(c)).

bankrupt. The pension fund attempted to assess withdrawal liability against the seller, claiming that the sale was made for the purpose of avoiding liability. The court held that the seller was not liable under § 1392, because "when the seller enters a transaction to escape liability, but the buyer has no intention of taking subsequent actions that will reduce the payments owing to the Plan, it does not appear that a 'principal purpose of the transaction' as a whole is to escape liability." Dorn's, 787 F.2d at 902.

The court in Dorn's was able to decide the issue of evade or avoid liability as a matter of law because there was no evidence that the buyer even knew of the seller's potential withdrawal liability. Therefore, in the absence of a material fact issue, the court could decide the issue without sending the case to arbitration. Id. at 902-03.[4] In this case, in contrast, there were disputed issues of material fact, and there is evidence to support either inference on the issue of the buyer's intent. The arbitrator found as a factual matter that HAC did not have any intent to aid Tiger in avoiding withdrawal liability. He concluded that the evidence, rather than supporting the inference of collusion, indicated a confrontational relationship between Bodford and Tiger's management. Alternatively, recognizing that the Philadelphia Fund maintained that Dorn's did not apply, the arbitrator made a specific factual finding that evading withdrawal liability was not a primary purpose of the transaction for either party. The issue of evade or avoid

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4. The Philadelphia Fund argues that Dorn's is inapplicable to this case because the Third Circuit subsequently limited the holding to the facts of that case. The Third Circuit did limit Dorn's to its particular factual circumstances, but only on the issue of when an ERISA dispute may avoid arbitration. Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241 (3d Cir. 1987).

liability, therefore, was decided as an issue of fact by the arbitrator and should be reviewed by this court for clear error.

4. The Arbitrator's Factual Findings

The Philadelphia Fund argues that the overwhelming weight of the evidence points to an intent to evade withdrawal liability. Specifically, the Fund argues that such intent is reflected by the low purchase price, the large amount of liability that Tiger was facing, the likelihood that Hall's would fail, Tiger's willingness to give Bodford its remaining 25% stake in Hall's, and what the Fund argues was a collusive relationship between Bodford and Tiger's management. In addition, the Fund focuses on several "smoking guns," which it contends establish both awareness of the potential MPPAA liability and an intent to avoid liability through the sale of Hall's. (See D.I. 254 at 6171- 73)

To support its factual arguments, the Philadelphia Fund relies heavily on Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994). In Santa Fe, as in this case, there were two possible means of disposing of a troubled trucking subsidiary. One was an asset sale; the other, a sale of stock. In both Santa Fe and this case, the evidence established that an asset sale would have been more profitable to the parent company but for the potential withdrawal liability.[5] In Santa Fe, the arbitrator made no findings on other possible reasons for the sale structure chosen,

5. An asset sale does not fall under the change in corporate structure exception of § 1398. It is governed instead by 29 U.S.C. § 1384, which requires the seller to post a bond or escrow for all current withdrawal liability plus one year's contributions. More significantly, the section imposes secondary withdrawal liability on the seller if the buyer withdraws from the plan within five years of the sale.

and apparently ignored or discounted documents which left no room for doubt that the company was aware of the withdrawal liability issue and had even considered "'desperation moves,' including 'selling [the subsidiary] to someone in trouble.'" Id. at 729. The appellate court found the "arbitrator's treatment of these issues [to be] entirely inadequate" and concluded, contrary to the arbitrator, that a principal purpose for the sale was to avoid withdrawal liability. Id.[6]

In contrast, the arbitrator in this case made explicit findings on each one of the Fund's contentions. He concluded that although the asset sale might have turned out to have netted more for Tiger, there were other plausible reasons for structuring the transaction as a sale of stock, most importantly the belief that Hall's could eventually be turned around as a going concern under new management. This conclusion was bolstered by the fact that Tiger retained a 25% interest in Hall's. "[A]s long as Hall's was losing money," the arbitrator reasoned, "Tiger, as 100% owner, had no prospect either of collecting on its [$12 million intercompany] debt or receiving profits. If, however, . . . Hall's had more favorable prospects for returning to profitability under other ownership, then the potential return to Tiger from the sale obviously far exceeded Bodford's $1,000." (D.I. 254 at 6205) The arbitrator also found specific support for this conclusion in the apparently widespread belief that a non-Tiger controlled Hall's had a better chance of negotiating wage concessions in exchange for an ESOP, and thus returning Hall's to profitability.

6. The Fund also urges this court to adopt the Santa Fe court's legal ruling that a finding of evade or avoid liability depends entirely on the seller's motives. Significantly, this ruling is not controlling law in this circuit. Rather, this court must accept the interpretation set out in Dorn's, that escaping withdrawal liability can only be a primary purpose of the transaction as a whole where both buyer and seller have that intent.

As for the "smoking guns," the arbitrator found that although Tiger, HAC, Whit Lee, and others involved in the deal all seemed to be aware of MPPAA liability, there was nothing to connect that awareness to an evasive intent. He could find "nothing sinister about a business manager being aware that certain actions — such as downsizing portions of the operation — might trigger withdrawal liability, or that potential purchasers might have some reluctance about acquiring a company which is subject to such a contingent liability." (D.I. 254 at 6203) The court agrees with this conclusion, and again finds this case distinguishable from Santa Fe. None of the documents pointed to by the Fund makes an explicit statement of the type found in Santa Fe that the potential liability might lead to "selling to someone in trouble."

The Fund also focused on the timing of the sale as evidence that Tiger's true reason for selling was avoidance of MPPAA liability. It points out that Tiger was planning a public offering of preferred stock in early 1985, and that by selling Hall's before the end of the year, the subsidiary's potential withdrawal liability, and its triggering effect under the Override Agreement, did not have to appear in the registration statement. In so arguing, the Fund appears to equate avoidance of reporting potential withdrawal liability with avoidance of the liability itself. Only the latter is sanctioned by § 1392. Furthermore, the arbitrator addressed the Fund's contentions and concluded that the sale was timed so as to enable Tiger to report that it had disposed of an unprofitable subsidiary. The arbitrator noted that even after the sale, Tiger's registration statement included Hall's potential withdrawal liability as if it were still Tiger's. The registration statement also contained no mention of the other default-triggering events covered in the Override Agreement. The arbitrator concluded that he was "unable to

read this evidence as establishing that Tiger was attempting to avoid a further disclosure — the relationship between the Override Agreement and withdrawal liability — that all of the other evidence indicates that Tiger was very unlikely to have considered providing in any event." (D.I. 254 at 6197-6202) The Fund has not met its burden of showing that this conclusion is erroneous.

With respect to Tiger's transfer of its retained 25% interest to Bodford a year after the sale, the arbitrator noted that Bodford specifically threatened Tiger with the redemption of his 75% interest, which would make Tiger the sole owner of a company whose fortunes had taken a dramatic turn for the worse.[7] He concluded that "[t]he fact that Tiger so acted 'because of [MPPAA],' . . . does not, as the Fund suggests, demonstrate that Tiger had acted for the same reason a year earlier when it made the original transfer to HAC." (D.I. 254 at 6209) The court agrees with this assessment. Bodford's letter threatening to redeem his interest in Hall's does not support a finding that the initial sale was made for the purpose of evading liability. (Exhibit 326, Joint Appendix at 3425-26) In addition, the acrimonious tone of the correspondence belies any inference of collusion.

The court, therefore, is not convinced that the arbitrator erred in his finding that the sale of Hall's was not undertaken to evade or avoid MPPAA liability.

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7. MPPAA imposes liability, by reference to the Internal Revenue Code, on owners of at least 80% of the corporation's stock. 29 U.S.C. § 1301; I.R.C. § 1563(a)(1).

Appendix E

C. Accrual Liability

The Philadelphia Fund has set forth an alternative theory of recovery, that of accrual liability. According to this theory, even after a subsidiary is sold, the parent company (or any member of the controlled group as defined by 29 U.S.C. § 1301(b)) remains liable for the "debt" to the pension fund accrued up to the year of the sale, until such debt is fully amortized. The arbitrator, relying on a number of cases in which the theory had been rejected in similar contexts, refused to impose withdrawal liability on Tiger based on the accrual theory. (D.I. 254 at 6210-17) Because the accrual theory is an issue of law, the court will review the arbitrator's decision de novo.

ERISA provides that "all employees of trades or businesses . . . which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." 29 U.S.C. § 1301(b). Section 1398 provides that in the case of a change in corporate structure, "a successor or parent corporation or any other entity resulting from any such change shall be considered the original employer." The Philadelphia Fund contends that when a controlled group splits up, as in the sale of a subsidiary, all of the original members of the group remain "original employers," and each, therefore, retains a contingent liability for the withdrawal of any of the other members. The original members are responsible for the amount of the withdrawal liability that was "accrued" up to the time the group split up.

As noted by the arbitrator, several courts have analyzed and rejected the accrual liability theory. Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Central Michigan

Trucking, Inc., 857 F.2d 1107, 1109-10 (6th Cir. 1988); Godchaux v. Conveying Techniques, Inc., 846 F.2d 306 (5th Cir. 1988); Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Headley's Express & Storage Co., 1993 WL 189933 (E.D. Pa. June 3, 1993). These cases reveal two flaws in the accrual liability theory. The first concerns the Fund's definition of the employer; the second involves the Fund's determination of when withdrawal liability arises.

The Fund bases its interpretation of who is liable for the withdrawal of a former member of a controlled group in part on analogy to certain provisions of the Internal Revenue Code and corresponding regulations concerning controlled groups. 26 U.S.C. § 414(c); 26 C.F.R. §§ 1.1502-6(b), 1.1502-77(b). However, as the Sixth Circuit noted in Central Michigan Trucking, 857 F.2d at 1111 (6th Cir. 1988), the cited Internal Revenue Code provisions are not among those explicitly incorporated into the ERISA/MPPAA statute. "Absent such an express provision, tax precepts governing successorship are not dispositive of the meaning of MPPAA's successorship provision." Id. The Fund's theory also does not fit the plain meaning of § 1398:

> Terming the spun-off company as the "original employer" clearly shows that under MPPAA the new employment entity will be deemed the original employer, consequently only that employer and any control group to which it belongs at the time of withdrawal will be responsible for withdrawal liability.

Id. at 1109. The Sixth Circuit noted further that neither the statutory scheme of MPPAA nor the legislative history supports

the Fund's definition of "original employer." Rather, when a subsidiary is sold, the control group as a single employer ceases to exist. The spun-off company, and any new control group of which it becomes a part, becomes the "original employer" and is solely responsible for any withdrawal by the spun-off company. Id. at 1109-10.

The accrual theory is also flawed in its interpretation of when liability for withdrawal arises. The Fund argues that liability accrues over time, before actual withdrawal, whenever the plan to which an employer contributes develops unfunded vested liabilities. The section of MPPAA that defines withdrawal liability, however, does not support this reading: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). See Godchaux, 846 F.2d at 310. In addition, a plan's unfunded vested liability can vary greatly from year to year, depending on factors such as how well the plan is managed or changes in benefits. Id. at 311. It is not something that accrues steadily, nor is it a fixed amount that can be amortized over time.

The court, therefore, adopts the analysis of the Fifth and Sixth Circuits, and concludes that the accrual liability theory is invalid under ERISA/MPPAA.

IV. CONCLUSION

For the reasons stated above, the court concludes that the arbitrator did not err in his legal or factual determinations. The motion to enforce the arbitrator's award, therefore, will be granted, and the motion to vacate will be denied. An order consistent with this memorandum opinion will issue.

APPENDIX F — RELEVANT STATUTES INVOLVED

29 U.S.C. § 1369

§ 1369. Treatment of transactions to evade liability; effect of corporate reorganization

(a) Treatment of transactions to evade liability

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group (determined as of the termination date) shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date. This subsection shall not cause any person to be liable under this subtitle in connection with such plan termination for any increases or improvements in the benefits provided under the plan which are adopted after the date on which the transaction referred to in the preceding sentence becomes effective.

(b) Effect of corporate reorganization

For purposes of this subtitle, the following rules apply in the case of certain corporate reorganizations:

(1) Change of identity, form, etc.

If a person ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however

effected, a successor corporation resulting from such reorganization shall be treated as the person to whom this subtitle applies.

(2) Liquidation into parent corporation

If a person ceases to exist by reason of liquidation into a parent corporation, the parent corporation shall be treated as the person to whom this subtitle applies.

(3) Merger, consolidation, or division

If a person ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the person to whom this subtitle applies.

(Pub.L. 93-406, Title IV, § 4069, as added Pub.L. 99-272, Title XI, § 11013(a), Apr. 7, 1986, 100 Stat. 260.)

29 U.S.C. § 1384

§ 1384. Sale of assets

(a) Complete or partial withdrawal not occurring as a result of sale and subsequent cessation of covered operations or cessation of obligation to contribute to covered operations; continuation of liability of seller

(1) A complete or partial withdrawal of an employer (hereinafter in this section referred to as the "seller") under this section does not occur solely because, as a result of a bona

fide, arm's-length sale of assets to an unrelated party (hereinafter in this section referred to as the "purchaser"), the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if —

(A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;

(B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to the greater of —

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during such first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser —

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due,

then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3)(A) If all, or substantially all, of the seller's assets are distributed, or if the seller is liquidated before the end of the 5 plan year period described in paragraph (1)(C), then the seller shall provide a bond or amount in escrow equal to the present value of the withdrawal liability the seller would have had but for this subsection.

(B) If only a portion of the seller's assets are distributed during such period, then a bond or escrow shall be required, in accordance with regulations prescribed by the corporation, in a manner consistent with subparagraph (A).

(4) The liability of the party furnishing a bond or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) Liability of purchaser

(1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

(2) If the plan is in reorganization in the plan year in which the sale of assets occurs, the purchaser shall furnish a bond or escrow in an amount equal to 200 percent of the amount described in subsection (a)(1)(B) of this section.

(c) Variances or exemptions from continuation of liability of seller; procedures applicable

The corporation may by regulation vary the standards in subparagraphs (B) and (C) of subsection (a)(1) of this section if the variance would more effectively or equitably carry out the purposes of this subchapter. Before it promulgates such regulations, the corporation may grant individual or class variances or exemptions from the requirements of such subparagraphs if the particular case warrants it. Before granting such an individual or class variance or exemption, the corporation —

(1) shall publish notice in the Federal Register of the pendency of the variance or exemption,

(2) shall require that adequate notice be given to interested persons, and

(3) shall afford interested persons an opportunity to present their views.

(d) "Unrelated party" defined

For purposes of this section, the term "unrelated party" means a purchaser or seller who does not bear a relationship to the seller or purchaser, as the case may be, that is described in section 267(b) of Title 26, or that is described in regulations prescribed by the corporation applying principles similar to the principles of such section.

(Pub.L. 93-406, Title IV, § 4204, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1220, and amended Pub.L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1392

§ 1392. Obligation to contribute

(a) "Obligation to contribute" defined

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising —

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

(Pub. L. 93-406, Title IV, § 4212, as added Pub. L. 96-364, Title I, § 104(2). Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1398

§ 1398. Withdrawal not to occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —

(1) an employer ceases to exist by reason of —

(A) a change in corporate structure described in section 1369(b) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

(Pub.L. 93-406, Title IV, § 4218, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1236, and amended Pub.L. 99-514, Title XVIII, § 1879(u)(4), as added and amended Pub.L. 101-239, Title VII, §§ 7862(b)(1)(C), 7893(f), Dec. 19, 1989, 103 Stat. 2432, 2447.)

29 U.S.C. § 1401

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of —

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate,

unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in

writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

(Pub. L. 93-406, Title IV, § 4221, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 U.S.C. § 1451

§ 1451. Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of —

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of

fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub. L. 93-406, Title IV, § 4301, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

Supreme Court, U.S.
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No. 98-1133

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,

v.

NEW YORK STATE TEAMSTERS CONFERENCE
PENSION AND RETIREMENT FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
IRA R. MITZNER
WOODY N. PETERSON
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

VINCENT M. DEBELLA
Counsel of Record
PETER P. PARAVATI, JR.
PARAVATI, KARL, GREEN
& DEBELLA
12 Steuben Park
Utica, New York 13501-2992
(315) 735-6481
Attorneys for Respondent

February 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly confirmed an arbitration award when Petitioner failed to prove that the arbitrator made clearly erroneous findings of fact, had a bias against Petitioner or applied a statutory evidentiary presumption to Petitioner's detriment.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Respondent, New York State Teamsters Conference Pension and Retirement Fund, states that it is not a corporation, and has no parent company or nonwholly owned subsidiary.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE [1]

This case arises under the Multiemployer Pension Plan Amendments Act ("MPPAA" or "Act"), which amended the Employee Retirement Income Security Act.[2] MPPAA makes participating employers that cease contributing to a pension fund liable to the fund in certain circumstances for "withdrawal liability." In relevant part, MPPAA provides that withdrawal liability is to be determined and

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[1] In this brief, "Pet. ——" references are to the Petition for a Writ of Certiorari, and "A. ——" references are to the Appendix to the Petition.

[2] The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980, codified in relevant part at 29 U.S.C. § 1381 *et seq.*

collected without regard to any transaction entered into by an employer "[i]f a principal purpose" of the transaction is to "evade or avoid" that liability. 29 U.S.C. § 1392(c). If such a purpose exists, then the fund can assess withdrawal liability against the employer as if the transaction (typically a sale or similar transfer) had never occurred. *See id.*

An employer can contest a fund's determination of withdrawal liability, but only by submitting that issue to a MPPAA arbitrator. 29 U.S.C. § 1401(a). Under 29 U.S.C. § 1401(a)(3)(A), the fund's determination "is presumed correct" in the arbitration unless the employer convinces the arbitrator otherwise "by a preponderance of the evidence." *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 629 (1993). Similarly, if an employer seeks judicial review of the arbitration decision, there is "a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401(c). Such findings will be set aside only if found to be "clearly erroneous." *See* A. 11; *see also Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan,* 3 F.3d 994, 998-99 (7th Cir. 1993), *aff'd,* 513 U.S. 414 (1995).

In this case, Petitioner, The Sherwin-Williams Company, sold a wholly owned subsidiary, Lyons Transportation Lines, Inc. ("Lyons"), to J.R.C. Acquisition Corporation ("JRC"), a company that Sherwin-Williams knew had no assets, no financial backing and no corporate affiliation, at a price well below that offered by other bidders. It did so despite its knowledge that JRC had unsuccessfully sought financing for the original stock-for-cash transaction from more than 40 banks and real estate investors. Four months after the sale, both Lyons and JRC filed for bankruptcy. Respondent, New York State Teamsters Conference Pension and Retirement Fund ("Fund"), later determined that a principal purpose of the sale was to evade

or avoid Lyons' withdrawal liability. The Fund ultimately demanded that Sherwin-Williams pay Lyons' withdrawal liability in the amount of $477,270, including $35,795 in "gap year interest."[3] (A. 4-8, 12-17.)

Sherwin-Williams submitted the Fund's "evade or avoid liability" and "gap year interest" determinations to an arbitrator whom it and the Fund had selected. After a four-day hearing and pre- and post-hearing briefing, the arbitrator issued a 63-page decision. The arbitrator ruled in favor of Sherwin-Williams on the "gap year interest" issue, and in favor of the Fund on the "evade or avoid liability" question. (A. 8, 29.)

The Magistrate Judge, the District Court and a unanimous panel of the Court of Appeals affirmed the arbitrator's decision. The Sixth Circuit disposed of each of Petitioner's arguments in a detailed opinion reproduced at A. 1-20. After "reviewing the [arbitration hearing] exhibits and testimony, as well as the arbitrator's thorough and well-reasoned analysis" of the facts in his lengthy decision, the Court of Appeals first held in Part II.A of its opinion that Sherwin-Williams had failed to carry its statutory burden of rebutting, "by a clear preponderance of the evidence," the MPPAA presumption (29 U.S.C. § 1401(c)) that the arbitrator's findings of fact were correct. (A. 11-17.)[4]

The panel (in Part II.B of the opinion) then disposed of Petitioner's contention that a "statement" by the arbitrator proved that the arbitrator was biased against it and its witnesses:

> This "statement" is pieced together out of the final four pages of the arbitrator's 63-page decision and

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[3] This sum was a year's interest from the date the Fund determined the liability amount (December 31, 1989) to the assumed first payment date of January 1, 1991. (A. 29.)

[4] Those facts, set out in the Court of Appeals' opinion (A. 2-7, 11-17) and in the arbitrator's decision (A. 60-69, 102-07, 116-19), are incorporated herein by reference.

> opinion, ... Even considering this patchwork quotation in isolation, we find in it no indication of bias against Sherwin-Williams. The arbitrator observed that it would be impossible for a company such as Sherwin-Williams not to take withdrawal liability into consideration. In fact, the record is replete with evidence that Sherwin-Williams's employees discussed the issue frequently while deciding what to do about Lyons. The arbitrator opined that "in the overall context" the evasion or avoidance of withdrawal liability was a principal factor. *The arbitrator's task is to make precisely that kind of determination; i.e., to determine what, in the overall context, were the employer's principal purposes for undertaking the transaction at issue. The arbitrator's statement is not evidence of bias, but rather the articulation of a conclusion with which Sherwin-Williams disagrees.*

(A. 17-18 (emphasis added).)

Part II.C of the opinion (A. 18-20) agreed with Sherwin-Williams that the arbitrator failed to apply the statutory MPPAA presumption in favor of the Fund, but found it harmless error because the only harm was to the *Fund*, not Sherwin-Williams:

> The standard the arbitrator actually used was more favorable to Sherwin-Williams than the law allows, and the arbitrator still found against Sherwin-Williams. Sherwin-Williams cannot expect to find any more success under a less favorable standard.

(A. 20.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' DECISION DOES NOT RAISE ANY OF THE QUESTIONS PRESENTED

A. Question I asks whether "intent" can be determined "without considering the subjective evidence" of it. But the Sixth Circuit did not answer (and Petitioner never

asked it to answer) that question. What the Court of Appeals did decide, after evaluating *all* the evidence—direct, indirect, circumstantial, objective and subjective—was that Petitioner had not carried its burden of rebutting the MPPAA presumption that the arbitrator correctly found the facts. The arbitrator likewise considered Petitioner's subjective beliefs, but found them unworthy of credence, a finding sustained by the Sixth Circuit, "[g]iven the cornucopia of evidence" to support it. (A. 14.) In the absence of any actual controversy over this issue, Question I could be answered only by rendering an impermissible advisory opinion, and then on an evidentiary ruling in a single arbitration proceeding that would not constitute an "important matter" worthy of this Court's attention. *See* Rule 10(a) of this Court; *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

B. The premise of Question II is that the Court of Appeals judicially grafted onto MPPAA a new "express and fatal presumption" that a Fortune 200 company "always" considers withdrawal liability. The panel opinion is bereft of any such exercise in judicial lawmaking. All the Sixth Circuit did in this regard was to apply the presumptions and standards of review set out in MPPAA, as construed by this Court in *Concrete Pipe*, and hold that Petitioner had failed to carry its burden of demonstrating that a MPPAA withdrawal liability arbitration award should be vacated.[5]

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[5] A corollary premise of Question II appears to be that this Court should decide whether the arbitrator was biased against Sherwin-Williams. But even Petitioner concedes that "[p]erhaps the mere bias of a single arbitrator would not be a sufficient basis to invoke this Court's intervention." (Pet. 17.) Moreover, the courts below uniformly concluded that there is no record evidence of bias. To the contrary, the arbitrator ruled in favor of Sherwin-Williams on one of the two questions it asked him to answer (A. 8) and, as the Court of Appeals observed, "[i]f anything, the arbitrator gave *Sherwin-Williams* an advantage by failing to give the *Teamsters*

C. Question III likewise is not presented. MPPAA forbids an employer from using a stock sale as a means to evade or avoid withdrawal liability, commands arbitrators to assess such liability if they find, after examining all the evidence through the prism of the MPPAA presumptions, that such was a principal purpose of the transaction, and directs the district court and the court of appeals to confirm the award under MPPAA's narrow standard of review unless the employer meets its statutory burden of proof. The arbitrator, the Magistrate Judge, the District Court and the Court of Appeals simply followed the statute's mandate. Such faithfulness to the dictates of the Act hardly "shakes the foundation of MPPAA's statutory scheme" (Pet. i); rather, it cements it. Stripped of its hyperbole, Petitioner's true complaint is that the Sixth Circuit erred in affirming the District Court's confirmation of the arbitral award. Of course, that affords no sufficient reason for review by this Court.

II. THERE IS NO CIRCUIT CONFLICT; IN ANY EVENT, THE LEGAL ISSUE WAS NOT RAISED BELOW AND IS NOT PROPERLY PRESENTED HERE ON THE FACTS

A. Petitioner says that the Third, Sixth and Seventh Circuits differ "when analyzing whether a parent company sold its subsidiary with a principal purpose of evading or avoiding withdrawal liability." (Pet. 7.)[6] But the three

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Fund the benefit of the required statutory presumption" (A. 18 (emphasis added)).

[6] *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 787 F.2d 897 (3d Cir. 1986); *Trustees of Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Federal Express Corp.*, Nos. 86-304, 94-017, 94-033, 94-112 and 94-130, 1995 WL 791371 (D. Del. Dec. 27, 1995), *aff'd without opinion*, 96 F.3d 1432 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997); *Santa Fe Pacific Corp. v. Central States, Southeast & Southwest Areas Pension Fund*, 22 F.3d 725 (7th Cir.), *cert. denied*, 513 U.S. 987 (1994).

cases Sherwin-Williams cites (Pet. 8-10) "differ" only in the facts presented—all (not surprisingly) analyze the issue the same way as the statute commands and reach different conclusions on those varying facts. This Court does not sit to resolve "conflicts" among the courts of appeals created solely by differing fact patterns. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

Petitioner proceeds from the false premise that because all three cases involved a parent selling a subsidiary, and the circuits reached different results, these circuit courts must be in conflict. Given this Court's prudential limitations on its certiorari jurisdiction, such reasoning backward from the result cannot create a "conflict" worthy of this Court's attention. And, if there were such a conflict here so "particularly important and urgent" (Pet. 12) for this Court to review on certiorari, then one of these circuits would have identified it—none did. In any event, Petitioner nowhere suggests that the facts here would have led to a different result in any other circuit. Without such a demonstration, there is no reason for this Court to entertain the Petition.

B. Additionally, a review of these cases shows the conflict to be both irrelevant to the Petition, as well as illusory. None of the decisions mentioned, let alone decided, any of the Questions Presented that Sherwin-Williams tenders in its Petition. Nor is there any conflict among them on what they did decide. *Dorn's* did not even involve an arbitration decision, but only summary judgment on the question whether, in the "unusual circumstances" of a "rare case in which there was no need for the development of a factual record," and as a matter of statutory construction, a "withdrawal" took place upon which liability could be assessed. The Third Circuit held it had not. 787 F.2d at 898, 901, 903.[7] In *Santa Fe*, on the other hand,

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[7] Moreover, the Third Circuit "appears to have limited *Dorn's* to its particular facts." *Carl Colteryahn Dairy, Inc. v. Western*

the Seventh Circuit set aside an arbitral decision that avoidance of withdrawal liability had *not* been a principal purpose of the sale. 22 F.3d at 729-30. Moreover, the Sixth Circuit here, like the Seventh Circuit there (and the Third Circuit in *Dorn's*), did consider the seller's intent. There is thus no conflict requiring this Court's intervention.

C. To the extent the unreported district court opinion in *Federal Express* found a buyer's subjective intent to be germane, the record discloses that Petitioner never presented the buyer's intent issue to the District Court or the Sixth Circuit.[8] As a consequence, neither court considered it. Petitioner's failure to raise and preserve this evidentiary issue below should foreclose its review here. Petitioner nowhere explains why this Court should deviate from its settled practice and reach the merits of an issue neither raised in a Question Presented (*see* this Court's Rule 14.1(a)), nor pressed or passed upon in the lower courts. *Powell v. Nevada,* 511 U.S. 79, 85 n.* (1994) ("Because the issue was not raised, argued, or decided below, we should not settle it here."). Petitioner's failure to do so confirms that there is nothing about this lone fact-bound arbitration decision—upheld by each of the five judges who reviewed it—that warrants a grant of the Petition.

Pennsylvania Teamsters & Employers Pension Fund, 847 F.2d 113, 123 n.17 (3d Cir. 1988) (citing *Flying Tiger Line v. Teamsters Pension Trust Fund of Philadelphia & Vicinity*, 830 F.2d 1241 (3d Cir. 1987)), *cert. denied*, 488 U.S. 1041 (1989).

[8] In any event, the district court ruling in *Federal Express* would not pose the conflict with the Seventh Circuit's "buyer's intent" dictum in *Santa Fe* that Petitioner attempts to manufacture. An independent alternative ground for decision in *Federal Express* was that on the facts there presented, evading or avoiding withdrawal liability was not "a primary purpose" of the *seller*. (A. 130-34.) It was for this reason that the district court painstakingly and at length (A. 131-33) distinguished *Santa Fe* on its "seller's intent" facts—a needless exercise if the *Federal Express* district court opinion and *Santa Fe* turned on the supposed "buyer's intent" conflict on the law between the circuit courts that Petitioner posits.

D. Petitioner did not adduce *any* proof in the arbitration as to what the buyer's subjective intent was, much less sufficient proof to rebut the statutory presumption in favor of the Respondent Fund. As "the party more likely to have information relevant to the facts about its withdrawal from the [Fund]," Petitioner had the burden to do so. *Concrete Pipe*, 508 U.S. at 626.[9] Accordingly, even if there were a circuit conflict on the law as to the relevance of the buyer's subjective intent, Petitioner's failure of proof precludes its resolution on this record.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:
IRA R. MITZNER
WOODY N. PETERSON
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

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VINCENT M. DEBELLA
Counsel of Record
PETER P. PARAVATI, JR.
PARAVATI, KARL, GREEN
& DEBELLA
12 Steuben Park
Utica, New York 13501-2992
(315) 735-6481
Attorneys for Respondent

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[9] Nor did Petitioner proffer any such "buyer's intent" evidence three years after the arbitration hearing closed, when it prevailed upon the District Court to allow it to put into the record allegedly "new" evidence supposedly bearing on *Sherwin-Williams'* intent. (A. 29-31, 38-39.) Over the Fund's strenuous objections (which the District Court acknowledged were "well taken"), the District Court "reviewed the new evidence" and "determined that it would not change the Arbitrator's decision." (A. 39 n.1.)